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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*.), the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930, (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. § 151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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In re: EDWARD OTTER.
AWA Docket No. 441.
Decision and order filed February 2, 1988.

Failure to comply with various regulations and standards for animal care - Failure to maintain adequate reocrds - Failure to file answer.

Bradley Flynn, for Complainant.
Respondent, pro se.
Decision issued by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Animal Welfare Act, as amended, 7 U.S.C. 2131-2156, herein referred to as the Act, instituted by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, charging that the respondent willfully violated the regulations and standards, 9 C.F.R. § § 1.1-3.142, promulgated under the Act.

Copies of the complaint and Rules of Practice, 7 C.F.R. § § 1.130-1.151, governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as Findings of Fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Edward Otter, hereinafter referred to as the respondent, is an individual and his mailing address is Post Office Box 2386, R.D. #2, Pennellville, New York 13132.

2. The respondent, at all times material herein, operated as a dealer as defined in the Act and held a Class B license (21-PX) issued under the Act.

3. At the time of respondent's application for a license, he was given a copy of the regulations and standards promulgated under the Act and agreed in writing to comply with them.

4. The Animal and Plant Health Inspection Service ("APHIS") inspected the respondent's facilities on September 10, 1986, and discovered violations of the regulations and standards issued under the Act. The respondent received a copy of the inspection report prepared by the APHIS inspector at the conclusion of this inspection.

5. APHIS reinspected the respondent's facilities on November 10, 1986, and found the following willful violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the specified standards:

(a) Respondent failed to store properly animal feed and bedding in violation of 9 C.F.R. § 3.125;

(b) Respondent failed to dispose of animal waste in violation of 9 C.F.R. § § 3.125 and 3.131;

(c) Respondent failed to construct a perimeter fence to protect and contain the animals in violation of 9 C.F.R. § 3.125;

(d) Respondent failed to provide adequate drainage in deer and elk pens in violation of 9 C.F.R. § 3.127;

(e) Respondent failed to keep a skunk cage clean and sanitary in violation of 9 C.F.R. § 3.131;

(f) Respondent failed to keep the premises clean and free of soiled bedding and other debris in violation of 9 C.F.R. § 3.131; and

(g) Respondent failed to control rodents in violation of 9 C.F.R. § 3.131.

6. The APHIS inspection conducted on November 10, 1986, also disclosed that respondent failed to keep and maintain adequate records on monkeys and deer in willful violation of section 2.75 of the regulations, 9 C.F.R. § 2.75.

Conclusions

By reason of the facts set forth in the Findings of Fact above, the respondent has willfully violated sections 2.75 and 2.100(a) of the regulations, 9 C.F.R. § § 2.75 and 2.100(a), and the specified standards.

Order

Respondent Edward Otter shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. 2131-2156, and the regulations and standards issued thereunder, 9 C.F.R. § § 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondent, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to store properly animal feed and bedding as required by 9 C.F.R. § 3.125;

2. Failing to dispose of animal waste as required by 9 C.F.R. § § 3.125 and 3.131;

3. Failing to construct a perimeter fence to protect and contain the animals as required by 9 C.F.R. § 3.125;

4. Failing to provide adequate drainage in deer and elk pens as required by 9 C.F.R. § 3.127;

5. Failing to keep a skunk cage clean and sanitary as required by 9 C.F.R. § 3.131;

6. Failing to keep the premises clean and free of soiled bedding and other debris as required by 9 C.F.R. § 3.131;

7. Failing to control rodents as required by 9 C.F.R. § 3.131; and

8. Failing to keep and maintain adequate records on monkeys and deer as required by 9 C.F.R. § 2.75.

Respondent is assessed a civil penalty of $1,000 to be paid by certified check or money order made payable to the Treasurer of the United States. The check or money order shall be mailed to Robert M. Frisby, Office of the General Counsel, United States Department of Agriculture, Room 2014-South Building, Washington, D.C. 20250-1400.

Respondent's license is suspended for thirty (30) days and thereafter until he demonstrates to the Animal and Plant Health Inspection Service ("APHIS") that he is in full compliance with the Act and the regulations and standards issued thereunder. When respondent demonstrates to APHIS that he is in compliance with the Act and the regulations and standards issued thereunder, a supplemental order will be issued in this proceeding, upon the motion of APHIS, terminating this suspension.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. § § 1.142 and 1.145.

Copies hereof shall be served upon the parties.

[This decision and order became final April 19, 1988.-Editor]

In re: HANK POST, d/b/a STAGECOACH PRODUCTIONS, INC., STAGECOACH PRODUCTIONS, INC., KIRBY VAN BURCH, and ROBERT HANSBERRY, JR.
AWA Docket No. 295.
Order filed April 1, 1988.

Donald Tracy, for Complainant.
Joan Buckley, Las Vegas, Nevada, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

The attorney for respondent Kirby Van Burch has requested a stay of the order issued herein as to Kirby Van Burch pending an appeal to the United States Court of Appeals for the Ninth Circuit. The civil penalty and suspension provisions of the order issued herein are hereby stayed pending the outcome of the appeal. The cease and desist provisions of the order shall remain in effect.

In re: B.L. EGGLESTON.
P&S Docket No. 88-26.
Order filed April 20, 1988.

Edward Silverstein, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On April 6, 1988, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for two weeks and thereafter until such time as he complied fully with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued April 6, 1988,will be terminated after the expiration of the two period of definite suspension. The order shall remain in full effect in all other respect.

In re: CAMELOT SALES STABLES, INC.
P&S Docket No. 6779.
Order filed April 1, 1988.

Roberta Swartzendruber, for Complainant.
Robert L. Tammaro, Cranbury, New Jersey, for Respondent.
Order issued by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On March 24, 1987, an order was issued in the above-captioned matter which, *inter alia,* suspended respondent as a registrant under the Act until such time as it demonstrates that it is in full compliance with the bonding requirements under the Act and the regulations.

Respondent has now demonstrated that it is in full compliance with the bonding requirements under the Act and the regulations. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 24, 1987, is terminated. The order shall remain in full effect in all other respects.

In re: DICK H. MOREY.
P&S Docket No. 5912.
Order filed April 12, 1989.

Ken Vail, for Complainant.
Gary G. Kimes, Osceola, Iowa, for Respondent.
Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On February 19, 1982, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for a period of 45 days and thereafter until such time as he demonstrates that he is no longer insolvent.

Respondent has now demonstrated that he is no longer insolvent. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued February 19, 1982, is terminated. The order shall remain in full effect in all other respects.

In re: FLOYD STANLEY WHITE.
P&S Docket No. 6472.
Order filed April 1, 1988.

Thomas C. Heinz, for Complainant.
Donald R. Wellford, Memphis, Tennessee, for Respondent.
Order issued by Donald A. Campbell, Judicial Officer.

STAY ORDER

The civil penalty and suspension provisions of the order previously issued in this case are hereby stayed pending the outcome of proceedings for judicial review.

The cease and desist and recordkeeping provisions shall remain in effect.

In re: JUNIOR R. FITZGERALD.
P&S Docket No. 3311.
Order filed April 11, 1988.

Peter V. Train, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On September 21, 1964, an order was issued in the above-captioned matter which, *inter alia,* suspended respondent as a registrant under the Act until such time as he demonstrates that he is no longer insolvent.

Respondent has demonstrated that he is no longer insolvent. Moreover, twenty-three years have now passed since the order was entered. Accordingly,

IT IS HEREBY ORDERED that all provisions of the order issued September 21, 1964, are terminated.

In re: MARK V. PORTER.
P&S Docket No. 6538
Decision and order filed April 28, 1988.

Operation without adequate bond - Purchases out of consignment - Use of own livestock to fill order - Failure to pay, when due, for livestock.

The Judicial Officer affirmed Judge Baker's order requiring respondent to cease and desist from engaging in business without maintaining a reasonable bond or its equivalent; purchasing his own livestock out of consignments to fill an order, for the purpose or with the effect of increasing the price of such livestock to his principals; using his own livestock to fill an order order without disclosing his financial interest in such livestock and without disclosing such other facts as may be necessary to show fully the true nature of the transaction to the principal; and failing to pay, when due, the full purchase price of livestock. The order suspends respondent as a registant under the Act for 6 months, and thereafter until he complies with the bonding requirements, and asseses a civil penalty of $5,000. An act is willful if the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. Operating without the required bond is a violation of the Act, and unsuccessful efforts to obtain adequate bonding do not mitigate from the violation. Damage to a respondent from the agency's press release is given no weight in determining the sanction. Severe sanction policy explained. Complainant need only prevail by a preponderance of the evidence. It is unlawful for an agent to make a secret profit in transactions for principals. An agent is not permitted to have a secret interest in conflict with that of his principals. Where respondent made a secret profit, it is irrelevant that his principals were happy with his prices. Violations of a fuduciary duty are particularly serious.

Thomas C. Heinz, for Complainant.
J. Jarrette Sandlin, Sunnyside, Washington, for Respondent.
Initial Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on June 25, 1987, by Administrative Law Judge Dorothea A. Baker (ALJ) ordering respondent to cease and desist from engaging in business without maintaining a reasonable bond or its equivalent; purchasing his own livestock out of consignments to fill an order, for the purpose or with the effect of increasing the price of such livestock to his principals; using his own livestock to fill an order without disclosing his financial interest in such livestock and without disclosing such other facts as may be necessary to show fully the true nature of the transaction to the principal; and failing to pay, when due, the full purchase price of livestock.

The order suspends respondent as a registrant under the Act for 6 months, and thereafter until he complies with the bonding requirements, and assesses a civil penalty of $5,000.

On August 5, 1987, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).** The case was referred to the Judicial Officer for decision on September 10, 1987.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with a few changes or additions indicated by brackets, and omissions indicated by dots. The effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is an administrative, disciplinary proceeding under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*), hereinafter sometimes referred to as "the Act," instituted by a complaint filed on May 15, 1985, by the Packers and Stockyards Administration, hereinafter referred to as the "complainant." The complaint alleged that respondent failed to pay for livestock when due and purchased his own livestock out of consignment to fill orders with the purpose

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See generally Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1987 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural law, ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

of, or, the effect of, increasing the prices of such livestock to respondent's unknowing principals. By reason of these facts, respondent was alleged to have willfully violated sections 312(a) and 409 of the Act (7 U.S.C. § § 213(a), 228(b)) and section 201.44 of the regulations promulgated thereunder (9 C.F.R. § 201.44).

Respondent filed a timely answer admitting the jurisdictional allegations of the complaint and the allegation that he failed to pay, when due, for livestock; denying the remaining allegations of the complaint; and alleging various affirmative defenses. Thereafter, on January 6, 1986, complainant filed an amended complaint including all of the allegations in the original complaint in addition to allegations that respondent, after notice, operated his livestock business without having and maintaining adequate bond coverage in willful violation of section 312(a) of the Act (7 U.S.C. § 213(a)) and sections 201.29 and 201.30 of the regulations (9 C.F.R. § § 201.29, 201.30).

Respondent's answer to the amended complaint, although due to be filed with the Hearing Clerk in Washington, D. C., on or before February 3, 1986, was in fact filed on March 18, 1986. That answer re-alleged allegations contained in the original answer to the original complaint, generally denied the allegations that respondent operated his livestock business without adequate bond coverage, and made various allegations in the nature of a counterclaim.

An oral hearing was held May 6, 7, and 8, 1986 in Yakima, Washington, before Dorothea A. Baker, Administrative Law Judge. Respondent was represented by J. Jarrette Sandlin, Esquire, of the Sandlin Law Firm, 800 East Edison, P. O. Box 875, Sunnyside, Washington 98944. Complainant was represented by Thomas C. Heinz, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D. C. 20250.

In due course the parties filed briefs, the last brief having been filed December 15, 1986.

Findings of Fact

1. Mark V. Porter, hereinafter sometimes referred to as "respondent" is an individual doing business as MVP Farms, with a mailing address at P.O. Box 864, Sunnyside, Washington 98944. Respondent, at all times material herein, was engaged in the business of buying and selling livestock in commerce for his own account, or, the account of others, and buying livestock in commerce on a commission basis; and, was registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

2. That respondent was an individual doing business as MVP Farms was known to complainant's agents and employees at all times material hereto.

3. According to figures certified correct by respondent, on May 15, 1985, during calendar year 1984, respondent purchased livestock for his own account and for the account of others with a total cost of $4,465,023.80.

4. Section 201.30 of the regulations promulgated under the Act (9 C.F.R. § 201.30), requires a registrant, who during a calendar year purchases livestock for his own account and for the account of others with a total cost of $4,465,023.80 to have and maintain a surety bond with a face value of $35,000.00.

5. The complainant notified respondent by certified mail on July 25, 1985 that the $20,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was inadequate and that it was

necessary to increase this bond to $35,000.00. The respondent made attempts to increase his bond coverage but by reason of disciplinary charges pending against him, the respondent's bonding company, which was notified of pending charges by the complainant, failed to cooperate in increasing the bond. As late as the time of the oral hearing the respondent did not show that the bond coverage of $35,000.00 had yet been obtained.[1]

6. The respondent was further notified in said communication dated July 25, 1985, that if he continued his livestock operations under the Act without adequate bond coverage or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, the respondent has continued to engage in the business of a dealer and market agency without having and maintaining an adequate bond or its equivalent.

7. As of May 7, 1986 respondent had not filed his annual report for 1985 which was due to be filed on or before April 15, 1986.

8. The respondent maintains that he cannot operate his business without purchasing from consignment on behalf of his principals and he is willing to make greater disclosure of his interest in the cattle purchased out of consignment than he has in the past. Respondent's method of doing business was to purchase cattle from various satellite auction markets such as Marysville, Toppenish, and Everson, Washington, as well as markets in Eugene, Portland, McMinnville, Corvallis and Lebanon, Oregon. At times, the respondent was order buying, but, at other times he did not have purchasers for such cattle. However, in the interests of economics in transportation he purchased such cattle with the view to acquiring full loads on the trucks and delivered the cattle to the Sunnyside or Prosser auction markets, where he subsequently purchased them out of consignment for his principals. The complainant maintains that the respondent should either have shipped such cattle directly to the principals from the original purchase locations, or, have notified the principals specifically and, with particularity, that when they purchased the cattle, after repurchase by the respondent, they were buying the respondent's cattle.

9. Although the evidence shows that the buyers' bills from the Sunnyside Sales Yard and the Prosser Sales Yard, as a matter of course, would have scale tickets[2] stapled or attached thereto on the reverse side of the buyers' bills where the owner was designated to be MVP or MVP Farms, and although some of respondent's principals knew they were purchasing respondent's cattle, this was not true of all of the principals.

10. The evidence of record is fully supportive of the requested findings of the complainant with regard to the purchases made by the respondent:

(a) During the period from July 30, 1984, through November 19, 1984, respondent purchased on a commission basis 1,904 head of cattle out of

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[1]The only sanction sought by complainant as to inadequate bond coverage is a cease and desist order (Tr. 555).

[2]These were scale tickets issued by Sunnyside or Prosser, and not respondent.

consignments to Sunnyside Livestock Auction Market, Sunnyside, Washington, hereinafter sometimes referred to as "Sunnyside," and Prosser Livestock Market, Prosser, Washington, hereinafter sometimes referred to as "Prosser," for the purpose of filling orders from 12 different principals. Of those 1,904 head, 40 per cent (769 head) were owned by the respondent.

(b) During the period from July 30, 1984, through November 19, 1984, respondent purchased on a commission basis 716 head of cattle out of consignments to Sunnyside and Prosser for the purpose of filling an order from Bob Schenk of Paul, Idaho. Of those 716 head, 44 per cent (313 head) were owned by the respondent. Respondent had originally purchased them at various livestock auction markets including the markets in Washington and Oregon. The order was open-ended, that is, it had no apparent limit as to number.

11. Although the respondent maintains that he had no orders for the cattle when he acquired them nor did he intend to sell them to specific principals, the weight of the convincing evidence is that the respondent did in fact intend to resell the cattle to principals whether or not he had previous orders for them.

12. A review of the evidence of record shows that one of the principals for whom the respondent purchased cattle was Russell Czaplicki who purchased on behalf of Simplot Livestock and Robert Schenk. Mr. Czaplicki testified that the cost of cattle purchased by respondent, whom he knew by name and from whom he bought some feeder cattle on a 50 cents per hundredweight commission basis, was to be determined on the basis of weight determined at Sunnyside and Prosser. The cattle purchased by Mr. Czaplicki did not go to him directly but went to one of his customers. The respondent would telephone in the prices and weights and Mr. Czaplicki would pay the auction house directly. He indicated that the scale tickets presumably were sent with the cattle on the trucks. Mr. Czaplicki indicated that he advised the respondent that he did not care to purchase cattle from the Pacific Coast for health reasons and because they had a tendency to become "stale." Also, until the investigators from the complainant informed him that a lot of the cattle he had purchased from respondent Porter had been owned by respondent, Mr. Czaplicki was unaware of that fact and when he heard about it he was "unhappy." He did not consider it proper that respondent Porter was filling Mr. Czaplicki's orders with his own cattle as, in his opinion, its "customarily accepted as not being proper." With respect to the cattle purchased by Mr. Czaplicki, Mr. Schenk complained concerning the fact that some of the cattle were from the coast and some were "stale."

13. Respondent did not ship the cattle used to fill Mr. Schenk's orders directly from the markets where they were originally purchased, but rather shipped them to the Sunnyside and Prosser markets where they were consigned and repurchased by respondent at prices which, in substantially all cases were higher than the original purchase prices. Respondent was not acting as a dealer in these transactions, that is, he was not free to make a speculative profit. His sole compensation was supposed to be his buying commission. In all but 2 out of 74 instances where individual animals could

be traced from Mr. Schenk to the market of original purchase, the prices increased from 25 cents per hundredweight to $10.00 per hundredweight over the original purchase prices. Although the respondent incurred costs during the period between the purchase and repurchase of these cattle, there is not sufficient evidence of record to indicate what those costs were.

14. Mr. Schenk, for whom Mr. Czaplicki was agent, paid Sunnyside and Prosser directly for the costs of the cattle plus respondent's buying commission. The markets in turn paid respondent his buying commission. Respondent did not issue any accountings to Mr. Schenk.

15. Although Mr. Czaplicki, the agent for Mr. Schenk with whom respondent dealt, never received any scale tickets for the cattle respondent purchased, the Sunnyside and Prosser markets probably prepared and sent scale tickets with the shipments of livestock to the parties for whom Mr. Schenk had ordered the cattle. For those cattle included in the shipments which had been consigned by respondent, the scale tickets indicated the consignor was "MVP" or "MVP Farms."

16. The complainant relies upon documentary evidence with respect to the cattle purchased for Cipriano Esparza of Grandview, Washington. On September 10, 1984, at the Prosser market the respondent purchased four heifers on a commission basis for Mr. Esparza which cattle the respondent had purchased a few days before in McMinnville, Oregon, and Everson, Washington. Upon repurchase, the prices for these four animals increased from $1.00 per hundredweight to $6.50 per hundredweight over what respondent had paid for them originally. Admittedly, said price increase did not take into consideration any increment in costs which the respondent may have incurred between the time of purchase and repurchase. Also, on September 15, 1984, at Sunnyside respondent purchased 13 steers and four heifers on a commission basis for Mr. Esparza which respondent had purchased a few days earlier at Marysville, Toppenish, and Everson, Washington. Upon repurchase, the prices for these 17 animals increased by $4.25 to $8.50 per hundredweight over what respondent had paid for them originally. With respect to the price increases (reflected on Exhibit 8) the respondent testified to the effect that although at the time of purchase the respondent had no orders for them and that they were sent to Sunnyside with the purpose of putting them through the sale yard, he was approached by Mr. Esparza with respect to the purchase thereof for Mr. Esparza who was there at the time of the sale. In view of this testimony, which was uncontradicted, it appears that Mr. Esparza was made aware that he was purchasing cattle previously purchased and owned by the respondent. The complainant did not call Mr. Esparza as a witness.

17. The evidence shows that during the period from July 30, 1984, through November 19, 1984, respondent purchased on a $2.00 per head commission basis, 85 head of cattle out of consignments to Sunnyside and Prosser to fill orders from Mr. Esparza. Of said 85 head, there were 61, or 72 per cent, owned by respondent who had originally purchased them at various other markets a few days before consigning them to Sunnyside and Prosser. Thirty-two of the 61 head owned by respondent could be individually traced to the markets of original purchase by respondent.

18. Out of the aforesaid 32 head, Mr. Esparza was aware that seven belonged to respondent. On September 1, 1984, Mr. Esparza, being present at Sunnyside, requested respondent to purchase some black steers which respondent had earlier purchased on August 28, 1984, at Marysville and which he owned. Respondent also purchased on September 1, 1984, four heifers for Mr. Esparza from cattle he owned and there is no evidence that Mr. Esparza knew he was purchasing respondent's heifers.

19. Respondent issued no accountings to Mr. Esparza for any of the cattle purchased on order.

20. Also testifying was Larry Freeland, of Alma, Nebraska, a subpoenaed witness, owner of the Alma Livestock Commission Company, Alma, Nebraska, who testified among other things that the respondent, Mr. Porter, was an excellent buyer and was always real fair and the witness Mr. Freeland had no complaints. He indicated that the respondent, Mr. Porter, was a "top buyer" and an asset to the industry. In the course of his testimony Mr. Freeland indicated that he would have Mr. Porter purchase cattle for him on a commission basis of 50 cents per hundredweight. Mr. Freeland's method of payment came out of the procedure whereby the scale tickets and invoices would go along with the cattle to Mr. Freeland's customers, and Mr. Freeland would pay the sales barn on the basis of the invoices, where there was a totalized dollar and totalized weight figure. Further testimony of Mr. Freeland indicated that after the complainant's employees advised him that he was buying respondent's cattle he told them that he knew it [had occurred on one occasion (Tr. 206-16),] but that he had talked with Mr. Porter and had cleared it up and had advised him not to do it again. [Respondent did "do it again" on 12 occasions in September, October and November of 1984 (CX 29).] Mr. Freeland was aware that the scale tickets had "MVP" on them [, on the one occasion referred to above]. Said witness was also aware that the respondent on occasion would take cattle he had purchased out to his farm before running them through the auction market.

21. The complainant's evidence shows that during the period from September 22, 1984, through November 19, 1984, the respondent purchased on a 50 cents per hundredweight commission basis 398 head of cattle out of consignments to Sunnyside and Prosser for the purpose of filling orders for Mr. Freeland. Of those 398 head, 50 per cent (198 head), were owned and consigned by respondent. A few days before purchasing them to fill Mr. Freeland's orders, respondent purchased them at various markets in Oregon and Washington. Out of 69 head which could be individually traced to the markets of original purchase, 55 increased in price by 50 cents to $8.50 per hundredweight. These scale tickets were issued by the market where the cattle were purchased, not by the respondent who issued no accountings to Mr. Freeland.

22. Although until testifying, Mr. Freeland was not aware of the percentage of the livestock which respondent owned and which were used to fill his orders, nevertheless, he believed that he had straightened the problem out with the respondent. Although Mr. Freeland may not have been aware that approximately 50 per cent of the livestock purchased on his behalf by respondent belonged to the respondent, nevertheless, the import of his

testimony was to the effect that he was satisfied with the respondent's method of operations and the variance in the price was not of material import to him.

23. Although the respondent maintains that all of its principals were aware that Mr. Porter was selling them repurchased cattle, this contention is clearly controverted by the witness Jack Johnson, who purchased slaughter cows on behalf of G&G Meats, Inc., of Snohomish, Washington, of which he was a 50 per cent owner. During the period from July 30, 1984 through November 19, 1984, respondent purchased on a $3.00 per head commission basis, 240 head of cattle out of consignments to Sunnyside and Prosser for the purpose of filling orders. Of those 240 head, 27, or 11 per cent were owned and consigned by respondent. A few days before purchasing these cattle to fill the orders, respondent had purchased them at various markets in Washington. Out of the 11 head which could be individually traced to the markets of original purchase, 10 increased in price from 50 cents per hundredweight to $4.00 per hundredweight over the original costs. As a result of respondent's practice of repurchasing his own animals, G&G Meats, Inc., paid $191.95 or $17.45 per head more for these 11 cows than it would have paid had they been shipped directly when originally purchased. However, said figure does not take into account any additional costs which respondent incurred between the time of original purchase and the resale date. Respondent's only compensation for his buying services for G&G Meats, Inc., was supposed to be the $3.00 per head buying commission according to the terms of his agreement with G&G Meats, Inc.

24. Mr. Johnson clearly testified that he was not aware that the respondent was purchasing some of his own livestock out of consignments to fill the G&G Meats, Inc.'s orders prior to being contacted by an investigator from the complainant. Upon learning that respondent had engaged in this practice, Mr. Johnson ceased using respondent as a commission order buyer because, in his words, it was not "ethical . . . to buy cattle when you're a commissioned buyer, put them through a sale and buy them back again." At a later date, Mr. Johnson reemployed respondent on the strength of his promise that "there wouldn't be anymore of them practices going on." Nevertheless, respondent thereafter engaged in the practice on at least seven additional occasions, which Mr. Johnson first learned about from one of the complainant's employees on the date of the hearing.

25. Also testifying was Alan Chlarson of Moses Lake, Washington, who is an order buyer himself and who was unaware that respondent was using cattle owned by him to fill Mr. Chlarson's orders.

26. The evidence shows that during the period from July 30, 1984, through November 19, 1984, respondent purchased on a 50 cents per hundredweight commission basis 217 head of cattle out of consignments to Sunnyside and Prosser, of which, 101, or 47 per cent, were owned and consigned by respondent who had purchased them a few days before at various markets in Oregon and Washington. Of the 101 head, 27 could be individually traced to the markets of original purchase, and, the prices of 24 increased from 45 cents per hundredweight to $8.75 per hundredweight over the original purchase prices. Said figures do not take into account any costs which might have been incurred by respondent from the time of original purchase.

27. The amount of economic harm caused the principals by respondent purchasing out of consignment cannot be accurately determined and complainant relies upon estimates. The records identifying the weight and price per hundredweight for each individual animal were not available for most of the 769 head of cattle which respondent purchased out of consignment to fill orders. Therefore, the complainant resorted to "reasonable" estimates by using the average weights of cattle purchased for each principal during the period, the average lot weights for individual animals whose actual weight was not known, actual weights when known, and calculated weights after shrinkage, using all of the above. Such computation shows:

Principal	Price Increase Per Head	Number of Head	Total Increase
Schenk	$20.92	313	$ 6,547.96
Esparza	22.51	54	1,215.54
Freeland	23.03	198	4,559.94
G&G	17.45	27	471.15
Chlarson	13.48	101	1,361.48
	$20.02	693	$13,876.87

. . . .

28. The evidence does show that the principals indicated that the prices charged by the respondent for the cattle were reasonable and within the market value of the cattle. The principals had the right to either accept or reject the cattle which respondent purchased for them.

29. It is undisputed that the price markups determined by complainant should be adjusted by costs incurred by respondent, but such costs have not been adequately shown herein.

30. Both parties referred to costs associated with the respondent's method of acquiring cattle which otherwise would not have been incurred under different circumstances. The respondent emphasizes that the price markups of the respondent's consigned cattle did not take into consideration any of the costs of feed, transportation, weight loss (shrinkage), or other costs incurred by the respondent and associated with the caring for the cattle prior to the time of delivery for consignment, although these costs were incurred by the respondent in the transactions investigated. However, respondent did not provide any computation which would have associated such costs with the cattle in question, and complainant, on brief, seeks to rely upon a reconstructed set of figures to show that respondent did not incur such costs to the extent he said he did. However, even complainant's computation is not reliable enough to establish the true markup of the cattle after costs have been taken into account.

31. Also, complainant seeks to show that if respondent had done business in some other manner, he would not have incurred such costs.

32. The complainant emphasizes that by repurchasing his own livestock to fill orders, the respondent incurred commissions, no-sales, and other charges on the cattle which he would not have incurred if he had shipped the animals

directly to the principals from the original purchase locations. The respondent maintains that this is uneconomical in view of the transportation costs and the economic feasibility of acquiring full loads for the purposes of shipping the cattle. In addition, the respondent did not have, at all times, buyers for the cattle he was purchasing. Alternatively, the complainant argues that by repurchasing his own livestock to fill orders, respondent incurred commissions, no-sale, and other charges on the cattle he would not have incurred if he had shipped the animals directly from the original purchase markets to Sunnyside or Prosser, Washington, or to any other central location, and segregated them into shipments for his principals without consigning them to the Sunnyside and Prosser auction markets. The respondent maintains that, at times, some of the cattle were held by him in order to fatten them up or otherwise to remedy any sick cattle situations or to find buyers for the same. In any event if the respondent had made full disclosure to his principals relative to his methods of operation, there would have been nothing wrong with the way he was gathering cattle from satellite markets and consigning them at Prosser and Sunnyside.

33. The complainant's evidence shows that during the times material herein, Sunnyside charged a selling commission of 2.5 per cent of the selling price for beef cattle and $2.50 or $3.00 per head for each no-sale. During this same period, respondent consigned 4,029 of his own cattle into Prosser and Sunnyside markets. Of that number, he no-saled 1,522 head, that is, he refused to sell them because the auction bid prices were not high enough. Thus, the respondent incurred no-sale charges of between $3,800.00 and $4,500.00 for these 1,522 no-sale cattle. The complainant sets forth that this is assuming that Prosser had the same no-sale charges.

34. In 1984, respondent purchased 3,856 cattle on order with a value of $1,157,055.00. Of these, respondent purchased 769 head out of his own consignments during the period material hereto. There were additional expenses attributable to said 769 cattle which complainant has calculated. Those 769 animals had an approximate value of $231,411.00 (769 divided by 3,856 equals 20 per cent times $1,157,055.00 equals $231,411.00). The selling commission at Sunnyside on $231,411.00 worth of beef cattle would be $5,785.28 (2.5 per cent times $231,411.00), or $7.52 for each of 769 head. It is true respondent would not have incurred such additional expenses had he not repurchased out of consignment.

35. By reason of the facts set forth above the respondent breached his duties to its principals, some of whom were unaware that he was repurchasing his own cattle, causing them significant, but an undetermined amount, of economic harm. The respondent's actions were a violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and section 201.44 of the regulations (9 C.F.R. § 201.44).

36. The respondent on or about the dates, and, in the transactions set forth below, purchased livestock and failed to pay, when due, the full purchase price of such livestock:

Date of Sale	Seller	Amount	Date Paid	Days Payment Late
8-2-84	Toppenish Livestock Commission Co.	$4,640.79	8-7-84	4
8-29-84	McMinnville Auction Yard Inc.	$5,016.51	9-5-84	6
9-4-84	Marysville Livestock Auction Inc.	$5,967.81	9-11-84	6
9-13-84	Toppenish Livestock Commission Co.	$15,856.46	9-20-84	6
1-17-85	Toppenish Livestock Commission Co.	$20,359.33	1-24-85	6
1-26-85	Sunnyside Livestock Market	$14,328.98	2-5-85	8

The respondent seeks to justify such late payments by asserting that with respect to such tardy payments for livestock purchases, the respondent showed, through evidence adduced at the hearing, that livestock markets would send invoices through the mail which were properly paid by return mail and that delay in the mail caused a resulting delay in payment and a technical violation of the complainant's rules. Additionally, the respondent argues that such technical violation did not rise to the level of intentional or willful violation of the Act and does not constitute reckless or careless disregard of the statutory requirements. To call such violations technical is an understatement in view of the Department's published decisions.

37. By failing to pay when due for livestock purchased in commerce, respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. § § 213(a), 228(b)).

38. There is no evidence that the respondent kept a double set of books. The respondent did not make false entries or alterations in the records; and he has not covered up his sources of income in reports to the complainant.

39. The respondent argues that even if violations of the Act and the regulations are found, the sanctions sought by complainant should not apply because:

(a) the respondent has never been informed about increases in sanctions imposed by the complainant as a result of policy changes;

(b) the [complainant] has changed its policy concerning the severity of sanctions imposed, without providing notice to the public of any meetings concerning agency discussion of such policy prior to policy modification;

(c) there have never been any *written criteria* that have been published by the complainant for sanctions to be imposed upon respondents, including this one;

(d) the complainant does not apply the legal definition of "willfulness" as it relates to mental intent, nor is it aware of the definition of the legal term "negligence"; and

(e) the complainant failed to adjust the severity of the sanction for mitigating circumstances, such as the adverse effect on the Sunnyside community.

40. Failure to have and to maintain the proper bond coverage constitutes a violation of section 312(a) of the Act (7 U.S.C. § 213(a)) which provides:

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

41. Respondent's failure to make full disclosure to all his principals of his interest in the cattle he sold them is a violation of section 312(a) of the Act and section 201.44 of the regulations (9 C.F.R. § 201.44) which provide disclosure requirements applicable to commission livestock order buyers:

> Each market agency shall, promptly following the purchase of livestock on a commission or agency basis, transmit or deliver to the person for whose accounts such purchase was made, or the duly authorized agent, a true written account of the purchase showing the number, weight, and price of each kind of animal purchased, the names of the persons from whom purchased, the date of purchase, the commission and other lawful charges, and such other facts as may be necessary to complete the account and show fully the true nature of the transaction.

42. Respondent's failure to pay when due the full purchase price of livestock purchased by him in commerce is a violation of sections 312(a) and 409 of the Act.

43. Under precedent established by the Secretary's Judicial Officer, and as set forth in the Agriculture Decisions, the violations of the respondent of the Packers and Stockyards Act and the regulations promulgated thereunder, warrant the imposition of a sanction.

Conclusions

The sanctions sought by the complainant in this case are a suspension of respondent's registration to engage in business subject to the Act for a period of six months, the imposition of a $5,000.00 civil penalty, and the issuance of a cease and desist order.

The complainant indicates that the instant case is the first litigated case of its type since the change in sanction policy. Moreover, it is indicated that the complainant has been implementing this change on a case by case basis rather than through rulemaking proceedings. In fact, it is stated on brief:

"The agency sanction policy has never been promulgated through rulemaking proceedings because there was no requirement to do so."

For these reasons, the complainant indicates that the sanctions sought in this case are more severe than sanctions imposed for the same or similar violations which occurred before 1983. *In re: Machado*, 42 Agric. Dec. [1454 (1983)] (decision as to respondent Cozzi), *aff'd*, 749 F.2d 36 (9th Cir. 1984) (unpublished); *In re: Vealey*, 39 Agric. Dec. 8 (1980); *In re: Collier*, 38 Agric. Dec. 957 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re: Livestock Marketing Development Company, Inc.*, 33 Agric. Dec. 784 (1974); *In re: Wood County Livestock Auction, Inc.*, 33 Agric. Dec. 755 (1974).

The respondent argues that such requested sanctions are too severe; that the complainant has not issued a warning letter to the respondent; that complainant has changed its policy concerning the severity of sanctions imposed, without providing notice to the public of any meetings concerning agency discussion of such policy prior to policy modifications; that there was never any publication of the change in the complainant's sanction policy; that there has never been any written criteria that has been published by the complainant for sanctions to be imposed upon the respondent; and, that the complainant has failed to analyze any facts to consider mitigation or facts relating to the adverse impact on the Sunnyside community if the respondent were to go out of business.

. . . .

However, under the definition of "willfulness" as interpreted and applied by the Department of Agriculture, the actions of the respondent in knowingly using his own livestock to fill orders, without adequately advising all of his principals, describe a willful violation of the Packers and Stockyards Act. It consistently has been held by the Department of Agriculture's Judicial Officer that an act is willful if the violator (1) intentionally does an act which is prohibited, - irrespective of evil motive or reliance on erroneous advice; or (2) acts with careless disregard of statutory requirements. *Goodman v. Benson*, 286 F.2d 896 (7th Cir.); *In re: Shatkin*, 34 Agric. Dec. 296 (1975). Negligent actions or careless disregard of the Act and the regulations come within the definition of willfulness. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182. The *Butz* case stated, among other things, that the employment of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.

The complainant seeks to justify its sanctions on brief, and also through testimony at the hearing, by asserting that during the year 1983, the complainant conducted a complete review of the sanctions imposed for violations falling under Title III of the Act. That review disclosed that sanctions clearly had not been sufficiently severe to effectively deter registrants violating the law. The complainant found that the same violations were occurring repeatedly and in some instances the same people were found to repeatedly commit the same offenses. As the result of that review, the complainant indicated that it has since markedly increased the severity of sanctions sought to be imposed in all cases.

The record establishes that for a three and a half month period, respondent purchased 1,904 head of livestock out of consignment to fill orders from 12 principals. Of those 1,904 head, 769 or 40 per cent were owned and

consigned by respondent. Respondent knowingly repurchased his own livestock to fill these orders, creating a conflict of interest situation. As a market agency and fiduciary, respondent was duty bound to purchase the livestock at the lowest possible price. *In re: Walti-Schilling & Co.*, 37 Agric. Dec. 1010 (1978). As the person who owned the livestock he was bidding on, it was in his interest to purchase the cattle at the highest possible price. This conflict could have been cured if he had fully and completely disclosed his conflict of interest to his principals and they, with full knowledge of the circumstances, had approved his use of his own livestock to fill the orders.

Respondent issued no written accountings to his principals. The accountings issued by Sunnyside and Prosser do not satisfy his duty to disclose. Sunnyside and Prosser sales invoices said nothing about respondent's financial interest in the cattle, and although the markets issued scale tickets which bore the notations "MVP" or "MVP Farms," the record does not reveal whether all the principals always received scale tickets, or, if they did, if they were observant enough to observe and appreciate the "MVP" and/or "MVP Farms" notations.

Even if these notations were regarded as revealing respondent's ownership, the principals nevertheless would not possess all the facts regarding respondent's personal interest in the transactions, since they were not informed of the original purchase price, purchase weight and purchase location of the cattle. The record clearly shows the principals did not know and could not know the extent of respondent's financial interest in these cattle. It would obviously make a considerable difference to a livestock principal if his order buyer agent made a speculative profit on an individual animal of more than a hundred dollars rather than a dollar or two. Similarly, the origin of the cattle can be a crucial piece of information, as with Mr. Schenk who did not want "coasters," i.e., cattle that came from auction markets along the Pacific coast, and Mr. Chlarson who wanted "fresh" cattle rather than "stale" animals that had been stressed by movement from market to market. The scale tickets with "MVP" or "MVP Farms" notations did not reveal the amount of price markup from the original purchase to the repurchase at Sunnyside or Prosser, nor did they reveal the original source of the livestock. In short, the scale tickets did not reveal all the facts likely to have a bearing on the desirability of the transaction from the viewpoint of the principals.

The extent of the financial injury caused by respondent's breach of duty cannot be precisely determined. Respondent, on the other hand, claims his principals suffered no injury at all. He testified "the cattle very seldom were marked up any more than three or four dollars." But the record will not support that claim. Complainant's computation on brief gives respondent every benefit of the doubt, - the cattle were marked up on an average at least $20.00 per head at rates of from $.25 to $10.00 per hundredweight. Respondent further contends he repurchased the livestock just to cover his costs. Again, the evidence refutes his contention. Respondent introduced checks showing his 1984 business expenses were $53,916.51, and testified 60 to 70 per cent of that was attributable to his order buying and dealer (what he called "trader") business. Seventy per cent of $53,916.00 equals $37,742.00.

According to respondent's 1984 annual report, he handled 11,027 dealer livestock and 3,856 cattle bought on order, for a total of 14,883 head. That means respondent incurred expenses of $2.54 per head in 1984. The record shows that respondent did more than just cover his cost; he made a profit at the expense of his principals on the 769 cattle he repurchased to fill orders. The respondent's evidence does not sufficiently refute this conclusion.

Respondent no-saled 38 per cent of the cattle he consigned during the period of the complaint. Complainant asserts that is an extraordinarily high number and that such practice cost the respondent thousands of dollars. However, complainant has not shown what would be the average no-sales under the existing circumstances. Complainant seeks to refute the respondent's claim that he only no-saled cattle during a down market, what he called a "wreck," by requesting, after the hearing closed, that official notice be taken of the official livestock market news reports for respondent's trade area. Certified copies of these weekly reports for the period of the complaint were included in Appendix B to complainant's brief. This is objected to by respondent who had no opportunity to refute the same and official notice therefor is denied. Moreover, for the purposes of this decision it is not necessary to rely upon post-hearing evidence. In point of fact, respondent no-saled many cattle some of which may have been justified by reason of the market and some because he was using the auction market to generate profits on the cattle in addition to his order-buying commission in which event he would have been speculating at the expense of his principals. However, even complainant acknowledges that some no-sales occur in the ordinary course of business.

In short, premised upon the record as a whole, respondent breached his duties to his principals, causing them significant economic harm. In doing so, he committed a well-established violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and section 201.44 of the regulations (9 C.F.R. § 201.44).

The Act, and the regulations issued pursuant to it, require market agencies, packers and dealers to maintain a reasonable bond to secure the performance of their livestock obligations. (7 U.S.C. § 204, 9 C.F.R. § § 201.29, 201.30). The bonding provisions were regarded as a special protection against future losses to the livestock producers. (H. Rep. No. 94-1043, 94th Cong., 2d Sess. p. 5; S. Rep. No. 94-932, 94th Cong., 2d Sess. pp. 5-6). The Department considers such bonding provisions vital to the effective enforcement of the Packers and Stockyards Act and for the protection of livestock producers, *In re: George County Stockyard, Inc. et al.*, [45 Agric. Dec. 2342 (1986)].

The respondent's annual report indicated a dollar volume of livestock business requiring a $35,000.00 bond according to the regulations and he was notified to increase his bond coverage to that amount from $20,000.00. Respondent did not acquire the required bond coverage and continued operations without maintaining adequate bond coverage. This is a willful violation of the Act (7 U.S.C. § 204) and the regulations (9 C.F.R. § § 201.29, 201.30) thereto. Circumstances portraying respondent's efforts to obtain adequate bonding do not mitigate from the violation. *In re: Donald Hageman*, 43 Agric. Dec. 531 (1983); *In re: Molnar Packing Company*, 41 Agric. Dec. 935 (1982); *In re: E. Gursky*, 38 Agric. Dec. 1178 (1979).

Although respondent attempted to obtain the bond increase from the company from which he previously secured a bond, the company would not issue an increase in light of what the company understood to be complainant's charges against respondent, discovered as a result of a press release issued by the Department, after the complaint was filed. Therefore, respondent argues he cannot be found to have willfully failed to acquire the proper bond coverage. That argument has no merit according to the Department's decided cases.

The press release issued in this case accurately summarizes the charges against respondent. It was issued pursuant to standard operating procedure as "a proper exercise of the Government's informational program." *In re: James J. Miller*, 33 Agric. Dec. 53 (1974), *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974); *In re: Speight*, 33 Agric. Dec. 280 (1974). *Accord: F.T.C. v. Cinderella Career & Finishing School, Inc.*, 404 F.2d 1308, 1312-14 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 1014 (1969). The circumstances portraying respondent's efforts to obtain adequate bonding do not mitigate this violation. The aforesaid cases support the complainant's position that damage by the agency's press releases can be given no weight.

Failure to pay, when due, the full purchase price of livestock is a serious violation of the Act and constitutes an unfair and deceptive practice in willful violation of sections 312(a) and 409 of the Act (7 U.S.C. § § 213(a), 228(b)). *In re: Farmers and Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. [234 (1986)]; *W. I. Bowman v. United States Department of Agriculture*, 363 F.2d 81 (5th Cir. 1966); *In re: Mid-State's Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978).

The respondent has not shown that the Department acted beyond the purview of its statutory authority. The Act authorizes a maximum civil penalty of $10,000.00 for each violation (7 U.S.C. § 193(b)). The complainant asserts that inasmuch as respondent used his own livestock to fill orders on more than 32 occasions, failed to timely pay for livestock purchases on at least 17 occasions, and operated without an adequate bond for an uncounted number of days, he could be theoretically subject to civil penalties of several hundred thousand dollars. The complainant maintains that it has abided by the statutory requirement that in determining the amount of civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business (7 U.S.C. § 213(b)).

Suspensions, other than indefinite suspensions, imposed until a compliance with the financial condition, custodial account, and bonding requirements are achieved, are primarily imposed for deterrent purposes. The sanction policy of the Secretary has been implemented on a case by case basis with the sanction policy developing towards longer suspension periods in recent years. *In re: Mid-State's Livestock Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re: Rowland*, 40 Agric. Dec. 1934 (1981) [, *aff'd*, 713 F.2d 179 (6th Cir. 1983)]; *In re: Farmers Livestock Auction, Inc.*, [45 Agric. Dec. 692 (1986)]; *In re: Garver, supra; In re: Farmers and Ranchers Livestock Auction, Inc.*, [46 Agric. Dec. 234 (1986)] (Decision and Order as to Mr. Jerry Millspaugh).

In the case of *In re: Richard N. Garver*, [45 Agric. Dec. 1090 (1986), *aff'd*, 846 F.2d 1029 (6th Cir. 1988) (unpublished)] the Judicial Officer asserted his discretionary authority to, *sua sponte*, increase the agency's requested sanctions. He evaluated the sanctions ordered by the Administrative Law Judge and reiterated the Department's policy of imposing severe sanctions for serious and repeated violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to respondents, but also to other potential violators. It was further indicated in that decision that this policy has been followed in all of the Department's disciplinary proceedings since the early 1970's. Among other things set forth in that decision was the rationale by the Judicial Officer that he is not precluded from overruling the Department's sanction policy or from imposing a sanction greater than that recommended by the administrative officials. Cf. *In re: Rowland*, 40 Agric. Dec. 1934 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

Additionally, in the *Garver* case, *supra*, it was stated that:

> * * * It has consistently been held that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in livestock and meat industries prevails over the local interest that might be damaged as a result of a suspension order. [Footnote Omitted]

A brief review of the Judicial Officer's more recent decisions indicates the agency's requested sanctions are within the purview of such decided cases.

In the case of *In re: Blackfoot Livestock Commission Co.*, [45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987)] the Judicial Officer again set forth his authority with respect to the determination of sanction policy. Specifically considered in *Blackfoot* was the matter of shortages in the custodial account and it was reaffirmed therein that the Secretary has consistently held and the court's have sustained, that the failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 of the regulations is a violation of sections 301 and 312(a) of the Act (7 U.S.C. § § 208, 213(a)), as well as a violation of the regulations itself. (9 C.F.R. § 201.42). *In re: Arab Stockyard Inc.*, 37 Agric. Dec. 293 [, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978)]; *In re: Breckenridge Auction and Sales Co.*, 36 Agric. Dec. 1522 (1977); *In re: Sechrist Sales Co.*, 36 Agric. Dec. 665 (1977); *In re: Hardy*, 33 Agric. Dec. 1383 (1974); *In re: Miller*, 33 Agric. Dec. 53 (1974), *aff'd sub nom. Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974). The important relevance of the Blackfoot case to this case is in its narration of the authority of the Judicial Officer, *sua sponte*, or, otherwise, to determine the sanctions to be imposed in these disciplinary cases. In the *Blackfoot* case the Judicial Officer exercised his discretionary authority to *increase* the sanction sought by the complainant. In doing so, he had occasion to state:

> First, complainant relies on the fact that complainant advised respondent of the sanction it would seek if a hearing were held, and this is a factor which respondents consider in deciding whether or not to settle a case. However, respondents should know (or guess) that

the recommendation of complainant as to a sanction, although entitled to great weight, is not controlling . . . . (Emphasis Added)

In addition, the *Blackfoot* case indicated among other things that:

> Furthermore, the Judicial Officer had long before announced the view that in any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction would be imposed in the pending case, rather than merely announce that in future cases the sanction would be increased. . . .

Another recent case, although involving a substantial number of other violations, is that of *In re: Farmers and Ranchers Livestock Auction, Inc.*, [46 Agric. Dec. 234 (1986)].

As further authority to show the authority and discretion reposed in the Judicial Officer, with respect to sanctions, reference is made to the most recent case of the Department's Judicial Officer of *In re: Spencer Livestock Commission Co., and Mike Donaldson*, [46 Agric. Dec. ____ (Mar. 19, 1987), *aff'd*, No. 87-7189 (9th Cir. Mar. 8, 1988)] wherein the Judicial Officer reviewed a prior decision of the Eighth Circuit in *Glover Livestock Commission Co. v. Hardin*, 454 F.2d 109 (8th Cir. 1972), *rev'd*, 411 U.S. 182 (1973). That decision reviews the Judicial Officer's reasoning as to why a reviewing Federal court should not determine what is a reasonable suspension period. The position of the Judicial Officer is that:

> If the congressional purpose of this remedial legislation is to be achieved, and if any degree of national uniformity in sanctions is to be achieved, reviewing courts must not determine whether an administratively imposed suspension period is "reasonable" based on what suspension period they would have imposed. Rather, they [the reviewing courts] should reverse only if the administrative sanction fails to meet the standards of the Administrative Procedure Act, i.e., if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (5 U.S.C. § 706(2)(A)). And it goes without saying that an administrative suspension period that greatly exceeds that which would have been imposed by the reviewing courts is not necessarily arbitrary, capricious, or an abuse of discretion.

Because of its relationship to the matter of sanctions in the present case, the following quotations from the March, 1987, decision in the *Spencer Livestock Commission Co.* case are appropriate:

> In addition, the sanctions imposed under the Packers Stockyards Act in recent years have been much more severe than during earlier years, *e.g., In re Welch*, 45 Agric. Dec. [1932 (1986)] (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in

business subject to the Act); *In re Garver*, 45 Agric. Dec. [1090 (1986) (2-year suspension), *aff'd*, 846 F.2d 1029 (6th Cir. 1988) (unpublished)]; *In re Holiday Food Services, Inc.*, 45 Agric. Dec. [1034 (1986) ($50,000 civil penalty), *remanded*, 820 F.2d 1103 (9th Cir. 1987)]; *In re Corn State Meat Co.*, 45 Agric. Dec. [995 (1986)] ($50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. [590 (1986)] (6-month suspension), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. [234 (1986)] (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. [2238 (1985)] (decision on remand) (8-month suspension and $10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. [748 (1985)], *final consent decision*, 44 Agric. Dec. [1971 (1985)] ($10,000 civil penalty); *In re Powell*, 44 Agric. Dec. ___ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. [1220 (1985)] (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984)] ($77,000 civil penalty, with $27,000 suspended); *In re Mayer*, 43 Agric. Dec. [439 (1984)] (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983)], *aff'd*, 770 F.2d 888 (10th Cir. 1985) ($20,000 civil penalty).

In addition, the Judicial Officer set forth in the *Spencer Livestock Commission Co.* case his explanation of sanctions as follows:

> In determining sanctions to be imposed by the Department, great weight is given to the recommendation of the officials charged with the responsibility for administering the regulatory program. See *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 845-46 (1972) (ruling on reconsideration). Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Administrative Law Judges or the Judicial Officer, who come in contact with only a small part of the regulatory program.
>
> The recommendation of the administrative officials as to the sanction is not, of course, controlling. For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, *e.g.*, *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542 (1971). But if the alleged violations are proven, and it appears that the administrative officials have fully considered the respondent's contentions, the recommendation of the administrative officials as to the sanction needed to serve as an effective deterrent to the respondent and to other potential violators is given great weight. (Emphasis Added)

Thus the *rationale* of the above cited cases, as well as the authorities set th therein, indicate the sanction policy of the Department of Agriculture ich the Administrative Law Judge is required to follow. In other words,

the respondent has not shown illegality on the part of the complainant or that it acted beyond the purview of the law.

The Administrative Law Judge is imposing the sanctions requested by the agency for the reasons set forth in the above cases. The respondent's arguments with respect to what should be a proper sanction have been considered carefully.

The respondent argues that the sanctions sought by the complainant should not be of such severe nature in view of what the respondent considers to be the only substantial charge i.e., the failure of respondent to disclose his interest to his principals in livestock bought out of consignment. As noted above, it is found herein that the respondent also violated the prompt payment and the bonding requirements of the Act.

The Department's recent cases disclose that the sanction imposed herein is in keeping with other cases and the Department's sanction policy. In addition to the *Spencer Livestock Commission Co.* case quoted above, the Judicial Officer has most recently stated, in the case of *In re: Rotches Pork Packers Inc., and David A Rotches*, P&S Docket No. 6458 (Apr. 13, 1987) that:

> It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 213-42 (Mar. 19, 1987), [*aff'd*, No. 87-7189 (9th Cir. Mar. 8, 1988),] which is set forth as an appendix to this decision.[3]

[Footnote to quoted decision]

3 Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. [590 (1986)], *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenhaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975);

In re Marvin Tragash Co., 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g., In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____ (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, No. 87-7189 (9th Cir. Mar. 8, 1988); *In re Welch*, 45 Agric. Dec. [1932 (1986)] (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act); *In re Garver*, 45 Agric. Dec. [1090 (1986), *aff'd*, 838 F.2d 470 (6th Cir. 1988)] (unpublished)] (2-year suspension); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. [1034 (1986) ($50,000 civil penalty), *remanded*, 820 F.2d 1103 (9th Cir. 1987)]; *In re Corn State Meat Co.*, 45 Agric. Dec. [995 (1986)] ($50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. [590 (1986)] (6-month suspension), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. [234 (1986)] (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. [2238 (1985)] (decision on remand) (8-month suspension and $10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. [748 (1985)], *final consent decision*, 44 Agric. Dec. [1971 (1985)] ($10,000 civil penalty); *In re Powell*, 44 Agric. Dec. ____ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. [1220 (1985)] (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. [1124 (1984)] ($77,000 civil penalty, with $27,000 suspended); *In re Mayer*, 43 Agric. Dec. [439 (1984)] (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. [1848 (1983)], *aff'd*, 770 F.2d 888 (10th Cir. 1985) ($20,000 civil penalty).

In *In re Garver, supra*, 45 Agric. Dec. [at 1101-04 (1986)], it is explained that 2- to 5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30- to 60-day suspension orders would have been issued in comparable cases a few years ago.

In view of the *Rotches* case, *supra*, and other cases cited above, the sanction sought by the complainant in this case would be considered modest.

The respondent, throughout the oral hearing, and on brief, has raised questions with respect to the nature of the complainant's proof, the weight to be given thereof, and the extent to which such adduced proof tends to support the allegations of the complaint. The respondent's attorney properly challenged by appropriate objections, various matters with respect to the complainant's evidence and through his objections reserved the right to question the validity thereof.

In support of the allegations of paragraph III of the amended complaint, filed January 6, 1986, that respondent during the period of July 28, 1984, through November 19, 1984, purchased livestock at various auction markets, consigned such livestock for sale at Sunnyside Livestock market and at Prosser Livestock market, and repurchased such livestock to fill orders from various principals, for the purpose or with the effect of increasing the prices of such livestock to respondent's principals, the agency adduced convincing evidence by way of the investigation conducted by Miss Toups and so testified to by her, together with supporting documentary evidence. The respondent questions the thoroughness of Miss Toups, the investigating agent of the complainant in the following respects:

(1) She did not take any action to determine personally as the investigating officer, whether or not Mr. Porter's principals knew or understood that MVP or MVP Farms was Mr. Porter;

(2) Miss Toups did not copy any of the scale tickets that indicated that MVP Farms was Mark Porter for inclusion in the complainant's exhibits;

(3) Miss Toups, after being informed of the method whereby respondent acquired its cattle for sale failed to determine what costs were properly attributable to the respondent as a purchasing agent or dealer. The evidence shows that the respondent bought cattle at various markets throughout Washington and Oregon and consigned them at the Sunnyside Livestock Market and Prosser Livestock Market and bought them back to fill orders for his principals thereby getting complete loads at one market and avoiding the necessity on the part of his principals from writing many checks to many markets, and from having to send trucks to many different markets - a prohibitive expense which would have been incurred had the principals purchased two or three head of livestock at remote sales yards; and,

(4) Miss Toups, as well as other agency personnel, failed to take into consideration any of the costs of feed, transportation, weight loss or other costs associated with caring for the principals' cattle prior to the time of delivery, although the evidence reflects that such costs were incurred by the respondent in the transactions investigated.

It is true that Miss Toups did not attempt to ascertain the respondent's costs, but this failure is not a vital inadequacy which detracts from the documentary and other evidence.

The extent of the economic injury or financial harm caused by the respondent's practices cannot be precisely determined from the evidence of record. The respondent sought to absorb the expenses of purchasing the cattle at satellite sales yards by buying out of consignment sales. The complainant has not addressed itself to the testimony of the respondent and to respondent's Exhibit N relating to additional costs which respondent incurred by reason of his practice of buying at satellite markets. Undoubtedly, some of these costs were incurred. However, there was no computation as to the amount of costs which would be attributable to the animals here involved. The respondent maintains that his cost averaged in the neighborhood of $50.00 per head. The complainant maintains that the respondent made a profit of at least $20.00 per head. This last figure would be premised upon an attribution of $4.08 as respondent's per head expense in 1984. Although the

complainant on brief has set forth an analysis of its figures with respect thereto, such figures are unconvincing in view of the testimony of the respondent. However, as previously noted the respondent has been less than specific with respect to what expenses were attributable to the animals herein involved.

In addition, the complainant maintains that the respondent no-saled a very high percentage of animals, namely, 38 per cent of the cattle he consigned and that this was an additional cost to the respondent of thousands of dollars. The complainant seeks to refute the respondent's claim that he only no-saled the cattle during a down market by seeking official notice of the official livestock market news report for respondent's trade area, certified copies of which weekly reports for the period of the complaint were included as Appendix B in respondent's brief. This request for official notice was first made after the hearing closed and the respondent had no opportunity to refute or to reply thereto. Under the circumstances, the request for official notice properly is denied. If official notice were taken, the complainant would have us infer therefrom that there is no correlation whatsoever between respondent's no-sales and price changes in the market place. On the other hand, the respondent testified that he made these no-sales in the best interests of his principals. It is not unusual at auction markets to have no-sale cattle. This is recognized by the complainant. However, the complainant maintains that the respondent had too many no-sales but it does not indicate the extent to which it believes the no-sales exceeded what would be normally accepted as an appropriate number of no-sales. Moreover, if full disclosure to respondent's principals had been made, including no-sale costs, there would be no contention that respondent should have conducted his business in some other manner.

The complainant does not believe that the respondent should have been allowed to introduce testimony and documents into the record showing that a large number of people with whom the respondent did business and had contact did not want to see his registration suspended. Basically, what the complainant is objecting to is that certain owners, managers, or operators of stockyards subscribed to a document evidencing support of the respondent as a cattle dealer or broker doing business with their respective stockyards and indicating, "unequivocally that Mark V. Porter has always exhibited a high degree of professionalism in his dealings with us. He is trustworthy, reliable and a credit to the cattle sales industry. We have had first hand experience in dealing with Mark V. Porter and we can readily state that he is an honest businessman." (Respondent's Exhibit A).

The complainant maintains that such material is irrelevant and immaterial to the proceeding under the Department's policy, citing, *In re: Gilardi Truck and Transportation Inc.*, 43 Agric. Dec. [118 (1984)]; *In re: Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 426 (1983) (preliminary order), *final decision*, 42 Agric. Dec. 588 (1983); *In re: Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re: Powell*, 41 Agric. Dec. 1354 (198[2]); *In re: VPC, Inc.*, 41 Agric. Dec. 734 (1982); *In re: Hatcher*, 41 Agric. Dec. 662 (1982); *In re: Gus Z. Lancaster Stockyards, Inc.*, 38 Agric. Dec. 824 (1979); *In re: Sol Salins, Inc.*, 37 Agric. Dec. 1699 (1978); and *In re: Arab Stockyard, Inc.*, 37 Agric. Dec. 293, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978).

Notwithstanding the complainant's protest to the receipt of such evidence, the complainant does admit that it is required to take into consideration mitigating circumstances. However, it would show that the complainant determines what are mitigating circumstances. In this particular case, the complainant is not in a position to protest extensively with respect to such exhibit or testimony. With respect to witnesses whom complainant called, pursuant to subpoena, one of the questions posed to such witnesses concerned whether or not the witness was still doing business with the respondent, and what did the witness think of the respondent's satellite purchasing activities and subsequent resale at the Sunnyside or Prosser markets. Indeed, the respondent should have the opportunity to refute or otherwise explain such testimony. This it has done through respondent's Exhibit A.

The various contentions, averments, and arguments of the parties have been carefully considered, and to the extent, if any, not ruled upon, and which may be inconsistent with this decision, they are denied. The following order is issued.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent contends on appeal that the ALJ's findings are not adequately supported by the record, but the record abundantly supports the ALJ's findings. In fact, the proof here far surpasses the preponderance of the evidence, which is all that is required.[3] Respondent's arguments on appeal, in the main, merely reargue matters that were fully considered and correctly decided by the ALJ.

Respondent particularly challenges the ALJ's findings and conclusions that respondent made a secret profit on the 769 head of cattle purchased by respondent for principals from respondent's own cattle consigned to Sunnyside or Prosser. But the evidence clearly supports the ALJ. Appendix A to complainant's original brief filed on July 7, 1986, shows that the cattle purchased by respondent for principals from his own consignments were marked up an average of $20.02 per head, at rate increases of 25¢ to $10 per cwt. This appendix is based in part on conservative estimates from the evidence in the record (CX 4, 8, 11, 15, 26). In Complainant's Response to Respondent's Appeal, complainant sets forth an appendix showing the price increase per head on the 45 head where precise price increases could be determined. That tabulation based on precise figures shows that the average price increase per head was $19.90 per head, a difference of only 12¢ per head from complainant's $20.02 estimate. Hence the transactions where precise increases can be determined fully support the validity of complainant's $20.02 estimate as to the average price increase on all of the transactions involved in this case.

Respondent contends that the price increases were to offset respondent's expenses. But the ALJ correctly found that the evidence introduced by

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[3] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); Steadman v. SEC, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), aff'd mem., 614 F.2d 770 (3d Cir. 1980).

respondent at the hearing shows that respondent incurred average expenses of only $2.54 per head in 1984 (Initial Decision at 29-30).

However, instead of limiting respondent's expenses to an average of only $2.54 per head in 1984, which is based on respondent's testimony and exhibits indicating expenses of $37,742, complainant gave respondent the benefit of the doubt and used the higher expense figure certified to be correct in respondent's 1984 annual report, *viz.*, $60,748.43 (Complainant's Brief filed July 7, 1986, at 19; CX 2, p. 10). Dividing that larger expense figure by the total livestock shown in the 1984 annual report (11,027 dealer livestock and 3,856 cattle bought on order, for a total of 14,883 head), still results in average expenses of only $4.08 per head.[4] This leaves respondent with a secret profit of about $16 per head ($20.02 - $4.08 = $15.94).

It is well settled under the Packers and Stockyards Act and the law of agency that it is unlawful for an agent to make a secret profit in transactions for principals. As stated in *In re White*, 47 Agric. Dec. ____ (Jan. 11, 1988), *appeal docketed*, No. 88-3144 (6th Cir. Feb. 22, 1988):

> The Packers and Stockyards Act cases referred to above, requiring an order buyer to pass on to his principal the exact "purchase weights," are consistent with the common law agency principle that, "[u]nless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal." Restatement (Second) of Agency 388 (1958).[6]

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[6] *Accord Savage v. Mayer*, 33 Cal 2d 548, 203 P.2d 9, 10 (1949).

As stated in *Wade v. Diamond A Cattle Co.*, 118 Cal. Rptr. 695, 698 (1975):

> If an agent . . . buys property for his principal at a price less than he charges his principal, he must disgorge the secret profit even if the property is worth the larger amount and the principal was willing to pay it. (Thompson v. Stoakes (1941) 46 Cal.App.2d 285, 289- 290, 115 P.2d 830; Rest.2d Agency, § 388; see Haurat v. Superior Court (1966) 241 Cal.App.2d 330, 334, 50 Cal.Reptr. 520; 1 Witkin, Summary of Cal. Law (8th ed. 1973) Agency, § 90, p. 708.)

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[4]The ALJ incorrectly states that complainant's computations fail to take into account respondent's costs of feed, transportation, weight loss or other costs associated with caring for the principal's cattle before delivery to the principals. However, all of these costs except weight loss were reported by respondent in his annual report, which complainant used to determine the $4.08 per head figure, and the weight loss was determined (where figures were available) or estimated (using assumptions favorable to respondent, e.g., using 4% shrink rather than the 2% or 3% shrink stated by respondent (see Tr. 617; Appendix A, p. 1, to Complainant's Brief filed July 7, 1986)) in complainant's computation of the $20 02 average-increase figure.

This principle is recognized in *Spencer Livestock Commission Co. v. Department of Agriculture*, No. 87-7189, slip op. at 2848-49 (9th Cir. Mar. 8, 1988), as follows:

> Petitioners maintain that the ALJ erred in finding their conduct illegal under § 213 because their conduct did not threaten any of the interests the Act seeks to protect. They identify these interests as safeguarding sellers, protecting consumers, and protecting the industry from unfair practices of competitors. Petitioners stress "of competitors" as though the Act were nothing more than a mirror of the antitrust laws. They argue that since in none of the 17 transactions did the sales price exceed the prevailing market price, there was neither harm nor threat of harm to consumers.
>
> The JO rejected this line of argument by finding that "[e]ven if true, that fact would be irrelevant. An agent who secretly increases the weights and prices of livestock purchased on a commission basis for principals commits very serious violations of the Act even if the invoice prices to the principals are at or below the market." We rejected a similar argument in *Bosma*, where we found an average profit of $100 per head "sufficient evidence to support the J.O.'s conclusion that Bosma did not pay his consignors a fair price, regardless of whether they were satisfied with what they got." *Bosma*, 754 F.2d at 809.
>
> . . . .
>
> This argument relies on an incomplete understanding of the objectives of the Act. The primary purpose of the Act was "to assure fair competition and *fair trade practices* in livestock marketing. . . ." H.R. Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213 (emphasis added). It was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics. Thus, under the *Central Coast* rule, we uphold a finding of a § 213 violation where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors.

The record is quite clear that none of respondent's principals knew the full extent of his secret profits, and some of his principals did not even know of the existence of the conflict of interest situation, i.e., that respondent was buying for them on order out of his own consignments. For example, Jack A. Johnson (G&G Meats) testified (Tr. 139-41):

> Q. Did there come a time when an investigator from the Department of Agriculture, namely Tom Elwood, came to speak with you concerning your business arrangements with Mr. Porter?
>
> A. Yeah.

Q. And what did this gentleman tell you during that meeting?

A. He told me that he was buying cattle in his name and returning them through the sale and buying them in my name.

Q. Now, when you say "he", to whom are you referring?

A. Mark Porter.

Q. Did you know that before the investigator from the Department of Agriculture came to talk with you about it?

A. No.

Q. And what was your reaction upon hearing that news?

A. I wasn't very happy.

. . . .

Q. What action, if any, did you take upon learning from the investigators of the Packers and Stockyards Administration that Mr. Porter had sold his own animals to you?

A. I discontinued using him.

Q. I'm sorry sir?

A. I discontinued using him as a commissioned buyer.

Q. And why did you take that action?

A. Well, because in the trade that would not be ethical.
Q. To do what?

A. To buy cattle when you're a commissioned buyer, put them through a sale and buy them back again.

Q. Did there come a time, later time, when you again used Mr. Porter for buying cattle?

A. Yeah, I did.

Q. When was that, approximately?

A. I don't know exactly. Sometime back.

Q. And why did you take that action?

A. Mark came to me and came up to see me at the plant and said that there was a need for a buyer there and there wouldn't be any more of them practices going on.

Q. In the recent past, have you been using Mr. Porter to buy cattle for you?

A. Yes, I have.

Q. And have you been satisfied with his services?

A. The price has been fine.

Q. Do you know whether or not any of the cattle that Mr. Porter has acquired for you have been his own?

A. Yeah, I found out this morning.

Q. And how do you feel about that?

A. I don't like it.

Q. And why is that?

A. It's not honest.

Similarly, Mr. C. Alan Chlarson testified that he did not know that respondent was using his own livestock to fill Mr. Chlarson's orders, stating (Tr. 169-70):

Q. Did there come a time when representatives of the Packers and Stockyards Administration came to see you regarding your business association with Mr. Porter?

A. No. I received a phone call about two weeks ago.

Q. From whom?

A. Ms. Toups.

Q. And could you recount for us the nature of that conversation with Ms. Toups?

A. Well, she just asked basically what you have and she informed me that some of the cattle bought for me were some of his. That's what it boiled down to.

Q. And what did you tell her you thought after having heard that Mr. Porter bought some of his own livestock to fill your order?

A. Exactly what I told her was that what little business we'd done, any time Mark had done business for me it was all very much in line, the weight was right, the cattle were right, the quality was right, the money was right, but I wasn't real wild about that.

Q. Did you feel that buying livestock out of consignment to fill orders was wrong?

A. Well, it's against the law; it must be.

Q. Did you tell Ms. Toups that you felt that it was wrong?

A. Yeah, I told her I didn't really, you know, like the idea, no.

Another of respondent's principals, Larry Freeland, only learned of one occasion where respondent had purchased his own livestock out of consignments for Mr. Freeland, and Mr. Freeland requested respondent to stop that activity. Mr. Freeland testified (Tr. 206-11):

Q. What did the Packers and Stockyards Administration people tell you when they came to talk with you?

A. They said that we was buying some of Mark Porter's cattle.

Q. I'm sorry, I didn't hear.

A. Said we was buying some of Mark Porter's cattle, wanted to know if I was aware of it.

(Pause)

Q. And what was your answer to that?

. . . .

A. I told them that we knew it and we'd talked about it and had it cleared up. I told him not to do it again and like that, only my situation was that Mark had handled some of the cattle, would take them off the trucks that wasn't -- he felt that should be shipped at the time and therefore I got him at a later time and we had a different kind of a standing with it and we got it straightened out. I mean, he --

. . . .

THE WITNESS: We got it straightened out and we've done business after that. I guess that's all I was going to say.

. . . .

Q. How did it come to your attention that you had in fact purchased -- that you had purchased livestock which belonged to Mr. Porter?

A. Through the scale tickets.

Q. What did the scale tickets tell you?

A. It had MVP on there.

Q. And what did that mean to you?

A. Mark Porter.

Q. And what action did you take as a result of finding scale tickets with MVP on them?

A. I called Mark up and asked him if it was his cattle.

Q. Why were you concerned about that?

A. Well, I just -- I don't -- I wouldn't like buying -- he wouldn't like buying my cattle that I sent him on order, but we got it straightened out.

Q. And why wouldn't you like buying his cattle?

A. Well, he could -- he could buy them at any price he'd like, I guess.

Q. Was it your understanding that this occurred on only one occasion?

A. I believe so. It's been so long ago that it maybe -- it might have been more than once, but as I can recall, it was only one time we had that misunderstanding.

Q. Is your attitude toward Mr. Porter based on your understanding that it only occurred on one occasion?

A. Well, my dealings with him is it might have been some of his own cattle but he'd had them out to his farm and put them on that way. It's been the only other occasion that I'd know of.

As stated in Finding 20, *supra*, although Mr. Freeland knew of only one occasion on which respondent had purchased his own cattle out of consignment to fill Mr. Freeland's order, and Mr. Freeland requested

respondent not to do it again, respondent did the same thing on 12 other occasions.

Finally, Mr. Russell Czaplicki, who bought livestock from respondent to be sent directly to Simplot Livestock and Robert Schenk, testified (Tr. 234-35, 237-38):

Q. What did the Packers and Stockyards Administration people tell you that they had found?

A. That Mark had bought these cattle that belonged to him through these auctions.

Q. What cattle are you referring to?

A. The cattle -- a lot of the cattle we had purchased from him had been owned by him.

Q. Were you aware of that fact before the Packers and Stockyards Administration people visited with you?

A. No.

Q. What was your reaction upon hearing that news?

A. I was unhappy.

Q. Why?

A. Well, I think more than anything else is that I trusted him and I told him I wanted to know what he was doing and I didn't -- I didn't like what I heard.

Q. Why were you concerned that he was filling the order with his own cattle?

A. I didn't consider it to be proper.

Q. Why not?

A. It's customarily accepted as not being proper.

. . . .

Q. All right.

Mr. Czaplicki, I presume one of the reasons you are disappointed or were disappointed when Packers and Stockyards Administration contacted you about their concerns was that you say you trusted Mark; is that right?

A. Correct.

Q. That trust, was that built upon the business relationship that you'd established where he had performed for you?

A. No, I just -- I wouldn't say that. I just -- by nature I like -- you know, you have to trust who you're dealing with or you better not do it.

Q. Did you ever check any of those scales receipts or anything to see who the purchaser --

A. I never saw them.

Q. You never saw them?

A. (Shakes head.)

Even if respondent had not made a secret profit in the transactions in which he purchased his own livestock out of consignments to fill orders, his conduct would have seriously violated the Act because of the inherent, secret conflict of interest existing. When respondent was buying livestock out of consignments for principals, it was his duty to buy for the principals at the lowest possible price. However, in his capacity as a seller of the same livestock, he had a self-interest conflicting with his duty to his principals. Respondent's self-interest would not have permitted him to bid up his own livestock to ridiculously high levels, when purchasing for principals, since that might have caused principals to cease doing business with him. But it was at least in respondent's interest on many occasions to not buy for his principals at the lowest possible price (when that price would not at least reimburse respondent for his expenses).

Moreover, the evidence shows that respondent repeatedly protected his self-interest as a seller through no-sales of his own livestock when he felt that the price was too low, thereby preventing his principals from otherwise having respondent buy for them at the lowest possible price. Specifically, during the times material to this case, respondent no-saled 1,522 head out of 4,029, or 38%, of his own cattle consigned to Sunnyside and Prosser, where he was buying on order for principals (Finding 33, *supra*).

Respondent testified that if he bought a steer at a satellite market for 45¢, and the market dropped from 3¢ to 5¢ that week, and he no-saled the steer, it was to the principal's advantage, because otherwise respondent would have charged the principal the original 45¢ price (Tr. 670-72). The fallacy in respondent's position is that he decided in advance that it is impractical to deliver livestock to his principals directly from the satellite markets, that he must bring them in his own name to the assembly markets at Sunnyside or Prosser, and then purchase his own cattle for principals, out of his own consignments, in order to handle the livestock efficiently, for the overall advantage of principals.

Accordingly, when respondent brought livestock from satellite markets to the assembly markets at Sunnyside or Prosser, and consigned them for sale at the assembly markets in his own name, he had already determined that the principal would not pay the original purchase price at the satellite market (e.g., 45¢). In these circumstances, respondent's no-sales were to protect respondent from selling his livestock at a price too low to recoup his original purchase price and expenses, which was in conflict with his fiduciary duty to his principals to buy at the lowest possible price.

It may well be, as respondent contends, that his method of operation is efficient, eliminating some costs and problems for principals. In fact, the evidence indicates that respondent can keep his principals happy while still making a secret profit for himself. But his method of operation is, nonetheless, an unfair and deceptive practice, in violation of the Act.

Respondent also challenges the sanction imposed in this case. But the serious nature of violations of a fiduciary duty have been set forth many times before, e.g., *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 210-11 (Mar. 19, 1987), *aff'd*, No. 87-7189 (9th Cir. Mar. 8, 1988). In view of all of the violations involved in this case, the sanction requested by complainant and imposed by the ALJ is fully warranted.

For the foregoing reasons, the following order should be issued.

Order

Respondent Mark V. Porter, individually or through any corporate or other device, shall cease and desist from:

1. Engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining a reasonable bond or its equivalent, as required by the Act and the regulations;

2. Purchasing his own livestock out of consignments to fill an order, for the purpose or with the effect of increasing the price of such livestock to his principals;

3. Using his own livestock to fill an order without disclosing his financial nterest in such livestock and without disclosing such other facts as may be necessary to show fully the true nature of the transaction to the principal of such order; and

4. Failing to pay, when due, the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of 6 months, and thereafter until such time as he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding requirements, a Supplemental Order will be issued in this proceeding terminating this suspension, after the expiration of the 6-month suspension period.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty of $5,000.

The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Room 2446, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on said respondent.

The cease and desist provisions of this order shall become effective on the day after service of this order. The suspension provisions shall become effective on the 30th day after service of this order on respondent; *Provided, however,* That if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

In re: OSCAR K. BAUMERT,JR.
P&S Docket Nos. 6720 and 6803.
Order filed April 13, 1988.

Andrew Stanton, for Complainant.
Gary J. Heim, State College, Pennsylvania, for Respondent.
Order issued by Victor W. Palmer, Administrative Law Judge.

SUPPLEMENTAL ORDER

On April 13, 1987, an order (P. & S. Docket No. 6720) was issued in the above-captioned matter which, *inter alia,* suspended respondent as a registrant under the Act or period of five years providing, however, that a supplemental order may be issued terminating the suspension at any time after 90 days upon demonstration that all unpaid livestock sellers have been paid in full, and that the order may be modified upon application to the Packers and Stockyards Administration to permit the salaried employment of the respondent by a registrant after expiration of the 90 day period of suspension.

On October 23, 1987, an order (P. & S. Docket No. 6803) was issued in the above-captioned matter which suspended respondent as a registrant under the Act for a period of 30 days in addition to the period of suspension imposed in the order issued in P. & S. Docket No. 6720, and thereafter until he complied fully with the bonding requirements under the Act and the regulations. The order also provided that after expiration of the suspension periods imposed in P. & S. Docket Nos. 6720 and 6803, respondent demonstrates that he is in full compliance with such bonding requirements, a supplemental order will be issued terminating respondent's suspension. The order provided further that it may be modified upon application to the Packers and Stockyards Administration to permit the salaried employment of respondent by a registrant after the expiration of 30 days from the effective date of such order.

Respondent has requested that the April 13, 1987, and October 23, 198 orders be modified to permit his salaried employment by a registrant, as tl 90 day suspension period referred to in the April 13, 1987, order and the : day suspension referred to in the October 23, 1987, order have expire Accordingly,

IT IS HEREBY ORDERED that the orders of April 13, 1987, a October 23, 1987, are modified to permit the employment of respondent a registrant, with the orders remaining in full effect in all other respects.

In re: ROSS WATTS.
P&S Docket No. 6941.
Decision and order filed February 23, 1988.

Failure to pay, when due, the full purchase price of livestock - Failure to file answer.

Eric Paul, for Complainant.
Respondent, pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards A 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referr to as the Act, instituted by a complaint filed by the Acting Administrat Packers and Stockyards Administration, United States Department Agriculture, charging that the respondent wilfully violated the Act a regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et se* governing proceedings under the Act were served upon respondent by t Hearing Clerk by certified mail. Respondent was informed in a letter service that an answer should be filed pursuant to the Rules of Practice a that failure to answer would constitute an admission of all the mater allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in t Rules of Practice, and the material facts alleged in the complaint, which a admitted by respondent's failure to file an answer, are adopted and set fo herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Respondent Ross Watts, hereinafter referred to as the responde is an individual also doing business as Watts Livestock whose principal pl of business is, and at all times material herein was, Route 1, P.O. Box 1 Osceola, Nebraska 68651.

(b) Respondent is, and at all times material herein was:

(1) Engaged in business as a dealer buying and selling livestock commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a market agency to buy livestock in commerce on a commission basis and as a dealer to buy and sell livestock in commerce for his own account.

2. (a) Respondent, on or about the dates and in the transactions set forth in paragraph II(a) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(b) As of the date of issuance of the complaint, respondent owes a balance of $77,885.00 in connection with the transactions set forth in paragraph II(a) of the complaint.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. § § 213(a), 228b).

Order

Respondent Ross Watts, directly or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock; and
2. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for a period of five years, provided that a supplemental order may be issued terminating the suspension after 150 days, if restitution has been made; and further provided that the order may be modified after 150 days to permit respondent's salaried employment by another registrant or by a packer.

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This decision and order became final April 4, 1988.-Editor]

In re: VICTOR L. KENT & SONS, INC.
P&S Docket No. 6783.
Decision and Order filed April 29, 1988.

Market agency - Dealer - Selling charge assessed against buyer - Agency - Fudiciary duty of agent to principal.

The Judicial Officer reversed Judge Palmer's Decision and Order, which had accepted, subject to certain publishing, posting and filing requirements, respondent's tariff. Respondent's tariff deleted the selling charge previously assessed against sellers of slaughter livestock, and assessed the charge against the packer buyers. Although the Judicial Officer gives great weight to findings of fact by ALJ's, he is free to substitute his judgment for that of the hearing officer on all questions. An agent is under a duty to sell at a price most favorable to his principal. If the agent has improperly received a bonus for making a sale, the amount which the agent has so received belongs to the principal. The law of agency is routinely applied under the Packers and Stockyards Act to protect farmers and ranchers. Violation of a fiduciary duty defeats the primary purpose of the Act. Although the legislative history of the Act requires rate competition, rather than ratemaking by the Department, the Secretary must determine if a rate is unjust, unreasonable or discriminatory. Respondent's tariff must be rejected under this standard. It is immaterial that respondent's customers are happy with his tariff. Complainant is not required to allege and prove precisely who was injured by an unlawful practice, or that an injury has in fact already occurred. New York State law, which permits an auctioneer to receive his fee from the buyer, is not controlling. Respondent's position is not aided by the fact that a livestock tariff apparently filed with complainant in 1964, without objection, shifts a small portion of the seller's fee to the buyer, since there was no proceeding in which that tariff was held to be valid.

Peter V. Train, for Complainant.
Nicholas A. Diceibo, Olean, New York, for Respondent.
Initial Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

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Preliminary Statement

This is a proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*),[1] involving the rates and charges assessed by the respondent corporation for rendering auction market services at the Victor L. Kent & Sons, Inc., auction market location in Sherman, New York. On November 5, 1986, pursuant to statutory authority (7 U.S.C. § 207) delegated him by the Secretary, the Administrator, Packers and Stockyards Administration (P&SA), filed a complaint, order of suspension, and notice of hearing. The complaint alleged that respondent's proposed tariff contained an unjust, unreasonable and discriminatory rate or charge in violation of the Act (7 U.S.C. § § 206, 208(a)), and ordered the implementation of the tariff suspended and deferred for 60 days. Administrative Law Judge (ALJ, now Chief) Victor W. Palmer conducted an expedited hearing on November 21, 1986, after which, on January 15, 1987, he accepted the proposed tariff for filing subject to certain named publishing, posting and filing requirements.

On March 2, 1987, complainant appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. § § 556 and 557 (7 C.F.R. § 2.35).[2] On March 31, 1987, respondent filed a response to complainant's appeal. The case was referred to the Judicial Officer for decision on April 16, 1987.

Based upon a careful consideration of the entire record, the (Chief) ALJ's initial decision (that Tariff No. 2 be accepted) is reversed for the reasons below. However, for convenience, the ALJ's findings and conclusions are set forth verbatim, except where changes are necessary to expand or reverse key findings and conclusions in the Preliminary Statement (at end); Findings 3, 5, 9, and 11; Conclusions 1, 2 and 3; and Discussion at 9, 10 and 11. Portions of the ALJ's text omitted are indicated by ". . .," and portions of the ALJ's text changed or expanded are indicated by "[]." The effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's (modified and reversed) conclusions and discussion.

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[1] *See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3, § § 3.33, 3.71-.74 (1981 and 1987 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. § § 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED AND REVERSED)

Preliminary Statement

This proceeding was initiated under the provisions of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as "the Act," by a complaint, order of suspension, and notice of hearing filed on November 5, 1986, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The complaint alleges that a tariff proposing changes in the stockyard rates charged at respondent's stockyard contained an unjust, unreasonable and discriminatory rate or charge in violation of the Act (7 U.S.C. § § 206, 208(a)). Pursuant to statutory authority (7 U.S.C. § 207), delegated to him by the Secretary of Agriculture, the Administrator ordered the implementation of the proposed tariff suspended and deferred for a period of sixty days.

In view of the limited period of deferment authorized by the Act, I conducted an expedited hearing on November 21, 1986, in Buffalo, New York. Complainant was represented by Peter V. Train, Esquire, Office of the General Counsel, United States Department of Agriculture. Respondent was represented by Nicholas A. DiCerbo, Esquire, Olean, New York.

At the conclusion of the hearing a briefing schedule was set, and later revised, under which respondent agreed to voluntarily withhold from charging the challenged rate until January 30, 1987. Briefing, in accordance with the revised schedule, was completed on December 29, 1986.

Upon consideration of the evidence of record and the proposed findings, conclusions and arguments of the parties, respondent's proposed tariff . . . [is rejected, and respondent's Tariff No. 1 shall remain in place until such time as respondent files a new tariff that is not unjust, unreasonable or discriminatory.]

Findings of Fact

1. Victor L. Kent & Sons, Inc., the respondent, is a corporation whose principal place of business is located at Route 430, Mayville-Sherman Road, Sherman, New York 14781.

2. The respondent is, and at all times material herein was:

(a) Engaged in the business of conducting and operating the Victor L. Kent & Sons, Inc., stockyard, a posted stockyard subject to the Act;

(b) Engaged in the business of selling livestock in commerce on a commission basis at the stockyard; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis and as a dealer to buy and sell livestock for its own account.

3. On September 24, 1986, respondent posted Tariff No. 2 at its stockyard to change its rates and charges, effective September 30, 1986, whereby the percentage charged consignors on the sale of dairy cows was to be increased, and its former percentage charges to consignors of slaughter cattle was to be replaced by a $10.00 per head charge to be paid by the buyers of slaughter cattle. [Tariff No. 2 did not meet the requirements in the regulations that

such tariffs be filed with the regional supervisor and be posted for at least 10 days prior to the effective date (9 C.F.R. § 201.17(a)).]

4. This tariff was posted at the stockyard office and at the entrance to the auction ring, but was not mailed to consignors.

5. Most consignors of livestock do not personally attend the sale to watch the sale of their animals or collect their proceeds checks. Instead, livestock is typically trucked from the farms to the market and the proceeds checks are mailed to the consignors. [Consignors are thus heavily dependent on their agent (the auction market) to protect their interests.]

6. In western New York, the volume of consignments is greatest during the period mid-September to mid-November, December as winter approaches.

7. Respondent placed several newspaper advertisements announcing the fact that there would be no commissions charged to the consignors of slaughter cattle. None of these advertisements pointed out the fact that these charges were being replaced by a buyer's fee.

8. Respondent inserted a flyer announcing there would be no commission charge on slaughter animals, when it mailed proceeds checks to its consignors. The flyer did not announce that the percentage commission charge would be replaced by a $10 per head buyer's fee.

9. In bidding on slaughter cattle, buyers take into consideration all costs in determining the appropriate amount to bid, and the imposition of a $10 per head buyer's fee will tend to decrease the amount bid per pound live weight. On the other hand, if the practice increases attendance at the market by buyers, as respondent and various of its customers and consignors believe, higher bids per pound live weight may nonetheless result. [However, there is no dispositive evidence in the record that supports this belief (Finding 11).]

10. The typical consignor compares prices obtainable at various outlets in determining where to market his livestock.

11. There is a recent trend in the sale of slaughter cattle, whereby farmers sell their cattle directly to meat packers at buying stations where the farmers are paid on the spot and avoid the sales commissions customarily charged at auction markets. [However, farmers are paid carcass rail weight at direct sale, and the producer stands the shrink (Tr. 143-44).] In order to compete with these buying stations, Mr. Kent and his sons decided to cease deducting commissions from the proceeds they obtained for consigned slaughter cattle. [A packer readily admitted that he would bid less per pound live weight, if charged a $10 fee (Tr. 142).] This decision was reached after discussions with the buyers who regularly attend their auctions. [The auction market (agent) did not seek approval from consignors (principals) before this deviation from business custom (see, *Restatement (Second) of Agency* § 424 Comment b (1958), *infra*.] Mr. Reuben Johnson of the Packers and Stockyards Administration's Lancaster office was then consulted about the proper phrasing of the new tariff by Mr. Muray Kent, an officer of the corporation, who was unsure whether to label the fee a buyer's fee or a handler's fee. When asked by Mr. Kent whether sellers may be relieved of fees on sales of slaughter cattle, Mr. Johnson advised him that officials in Washington would need to be consulted. During their next conversation, Mr. Johnson advised Mr. Kent that he thought the tariff would be approved, but warned him that the auction market would lose money if it indulged in such a practice. [However, the evidence is quite clear that Mr. Johnson did not understand

at that time that the commission not charged the seller would in turn be charged to the buyer as a per-head fee of $10 (Tr. 125).] They next discussed the buyer's fee and how that was to be worded. Mr. Johnson [obviously realizing this tariff was different than he originally understood it to be] again stated that he would have to consult Washington and would get back to him. When again Mr. Johnson and Mr. Muray Kent spoke, Mr. Johnson advised Mr. Kent to change the wording of the tariff to read: "... buyer's fee, ten dollars per head on slaughter animals to all buyers." Previous to Mr. Johnson's advice, the tariff did not contain the closing phrase, "to all buyers." This new version of the tariff was submitted to Mr. Johnson's office, making this the third time the tariff was submitted to the Packers and Stockyards Administration. [However, such submissions still did not meet the minimum requirements in the regulations that a signed copy of such tariffs must be "filed with the regional supervisor, at least 10 days before their effective dates. . . ." (9 C.F.R. § 201.17(a)). In any event, the fact that P&SA regional supervisor Johnson expended a lot of time and effort to assist respondent with this unorthodox tariff proposal, and even expressed the view that it would likely be approved, is not binding on the Packers and Stockyards Administration, the ALJ or the Judicial Officer.]

Mr. Johnson then spoke with Mr. Victor L. Kent, president of the respondent company. After Victor Kent's inquiry as to the status of the requested tariff change, Mr. Johnson said that it looked like it was all okay, and that respondent could proceed to advertise it in local newspapers. Advertising was then begun which stated that there would be no deductions on the prices paid consignors for slaughter cattle but did not indicate that a $10 per head charge would be assessed to buyers. [This omission was so misleading to consignors that the ALJ, although approving respondent's tariff, ordered corrective action in respondent's schedules of charges, advertising, flyers and sales invoices.] The new tariff was posted at respondent's auction market, above the cashier's window, at the auction block and on a trailer on the grounds. Buyers were sent letters in which they were notified that the market's tariff was being changed, and that per head charges would now be assessed against buyers on each slaughter animal sold.

On September 29, 1986, respondent was advised that complainant objected to the tariff and that it should no longer be used. During the period in which the tariff was used [September 30, 1986 to October 14, 1986 (Tr. 18)], there was no decrease in the number of buyers in attendance at the Kent auctions. Also, there was no apparent decrease in the prices per pound paid for cattle purchased at the Kent auctions conducted while the tariff applied. [However, this anecdotal experience (four sales days, and price per pound based on a 2-week period (Tr. 116-18), does not allow a proper empirical inference to be drawn that this pricing scheme helped (or hurt) the auction market. In any event, proper concern lies elsewhere, e.g., whether the consignors are properly protected by their agent (the auction market) under this pricing scheme. They are not properly protected where, as here, the pricing scheme is unjust, unreasonable and discriminatory.]

Conclusions

1. The evidence of record . . .[3] support[s] the allegations of the complaint that respondent's Tariff No. 2 contained rates or charges for stockyard services that should be prohibited and declared unlawful as "unjust, unreasonable, or discriminatory" within the meaning of 7 U.S.C. § 206.

2. The evidence of record . . .[4] support[s] the allegations of the complaint that respondent engaged in or will engage in regulations and practices in respect to the furnishing of stockyard services that should be prohibited and declared unlawful as "unjust, unreasonable, or discriminatory" within the meaning of 7 U.S.C. § 208(a).

3. . . . [Moreover], pursuant to 7 U.S.C. § 207, . . . the schedules in respondent's Tariff No. 2, . . . [concerning] the charges on the sale of consigned slaughter cattle, . . . [where] buyers [are charged] . . . a $10 per head charge . . . additional to the prices bid on a per pound live weight basis [are unjust, unreasonable and discriminatory, and are rejected.] . . . [Thus, Tariff No. 2 is rejected in its entirety.]

Discussion

[Two of] [t]he principal concerns that motivated complainant's challenge to respondent's proposed tariff are that farmers could mistakenly believe that their slaughter cattle would be sold by the market free of any charge and that the assessment of a per head charge to buyers on slaughter cattle would be contrary to the fiduciary responsibility owed by the market to its consignors.[5]

The advertisements initially circulated by respondent fueled the concern that the non-deduction of a commission from the proceeds on sales of slaughter cattle might lead a farmer to believe the market was providing a free service, as an inducement perhaps, for the farmer to also consign his dairy livestock sold as replacement animals on which percentage commissions still apply. . . .

In response to complainant's objection that, as the consignors' fiduciary, the market's charges for selling cattle should be to the consignors for whom it performs this service rather than to buyers, respondent cited New York case law which permits auctioneers' charges to be shifted from consignors to buyers. *Bleecker v. Franklin*, 2 E.D. Smith 93 (1853); *Muller v. Maxwell*, 2 Bosw. 355 (NY 1857). Those cases clarify that an auctioneer engaged by a seller may have an agreement with the seller that, after being announced to prospective buyers, permits the auctioneer's fees to be separately charged and directly collected from the buyer.

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[3]The words "does not" are omitted.

[4]The words "does not" are omitted.

[5]Complainant also believes that it is unreasonable for respondent to charge *buyers* for a stockyard service that is rendered to *sellers* (i.e., sellers of slaughter livestock); that it is discriminatory for respondent to charge consignors of replacement dairy cattle for services essentially identical to those *furnished* without charge to consignors of slaughter livestock; and that respondent's tariff is unjust and unreasonable because assessing the slaughter livestock fee against the buyer instead of the seller makes it impossible for farmers to compare prices between competing markets.]

[However,] the law of New York State is not controlling in our interpretation of a federal law designed to control interstate transactions that require uniform, nationwide treatment. . . .

It is to be noted that although percentage commissions [may be thought to be] preferable over per head charges as the better inducement to encourage an auctioneer to seek higher prices for his consignors, the Act permits per head charges and, in fact, the Department formerly sought to forbid tariffs that imposed percentage commissions. *See Giles Lowery Stockyards v. Department of Agriculture*, 565 F.2d 371 (5th Cir. 1977), and *Central Arkansas Auction Sales, Inc. v. Bergland*, 570 F.2d 724 (8th Cir. 1978). That Departmental position led to the 1978 amendment of section 305 of the Act, so that it currently reads (7 U.S.C. § 206):

> All rates or charges made for stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful:
>
> *Provided*, That rates and charges based upon percentages of the gross sales prices of livestock shall not be prohibited merely because they are based upon such percentages rather than a per head basis.

Accordingly, the Act allows the Department to prohibit a rate or charge only when it is unjust, unreasonable or discriminatory. . . . [M]arkets now actively compete for slaughter cattle sales, not just with one another, but with buying stations owned and operated for packers where prices per pound . . . [carcass (Tr. 143)] weight are paid farmers without sales commissions being deducted. . . . [In fact, some buying stations pay farmers a $10-per-head "transportation fee" (Tr. 135). However, packers pay on carcass rail weight after slaughter, not live weight, as at auction (Tr. 143-44).] The president of the New York State Livestock Marketing Association, who himself owns and operates an auction market, and who was called as a witness by complainant, testified (Tr. 108-110) that the new buying stations have so increased in number that they threaten the continued existence of auction markets; farmers care more about whether deductions are taken from their sales proceeds than whether the price paid is a penny more or a penny less per pound; the allegiance of a market would still be to its farmers who consign livestock even though its fees are paid by buyers; and an auction market should be allowed to establish its own rates within reason. [There was testimony that] under the new tariff attendance at the market increased, and prices per pound did not decrease. [(Tr. 116-18). However, this anecdotal 2-week period cannot form a valid empirical basis to draw an inference that this pricing scheme helped (or hurt) the auction market.] Upon consideration of . . . the other evidence of record I . . . [must] conclude that respondent's Tariff No. 2 . . . [is] unjust, unreasonable . . . [and] discriminatory. . . .[6] [R]espondent . . . [has] the right

[6]The (Chief) ALJ stated, "Upon consideration of this testimony and the other evidence of record I cannot conclude that respondent's Tariff No. 2 can be said to be unjust,

[generally] to conduct its business affairs as it chooses . . . [despite] resulting administrative inconvenience in making market pricing comparisons. *See, Goldberg v. Kelly*, 397 U.S. 254, 265-66 (1970); *Dobbs v. Costle*, 559 F.2d 946, 949 (5th Cir. 1977). [However, here the inconvenience in making market pricing comparisons is inconvenient *to the producers*, and it is the Department's *administrative duty* under the Act to reject improper tariffs and to protect, promote and safeguard farmers and ranchers against receiving less than the true market value of their livestock (§ II, *infra*)].

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's Tariff No. 2 is deemed unjust, unreasonable, and discriminatory, and is rejected for the many reasons set forth below. Thus, the (Chief) ALJ's decision is reversed, and respondent's Tariff No. 1 is reinstated, as set forth in the order below.

Although this proceeding is simply a case of the law of agency as interpreted within the mandates, purposes and objectives of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) (the Act), the legislative background and current livestock marketing competitive situation require a more substantial treatment of the issues.

As complainant correctly argues (Complainant's Proposed Findings of Fact, Conclusions, and Order and Brief in Support Thereof (Dec. 16, 1986)), this is a case of first impression. Since Congress altered the Secretary's ratemaking authority (to rely on competition) in 1978, as explained below, there have been no rate cases brought under the new regulatory scheme.

However, Congress retained within the Secretary the power to determine just, reasonable, and nondiscriminatory rates in the livestock marketing industry. Here, the law of agency, in conjunction with the Act, operates to show that Tariff No. 2 is unreasonable, and cannot stand. For some readers, the approach herein may appear an overly complicated way to reach the ultimate conclusion, but it is required for a proper resolution of the issues.

With this in mind, the approach herein will be to place this proceeding solidly within the law of agency in § I. Thereafter, the law of agency and how it has been interpreted within prior pertinent P&SA cases brought under the Act will be set forth in § II. Subsequently, the historical and legislative basis for this approach will be examined in § III. The rationale for this approach, of course, is to provide the framework for any future cases in this area, because this proceeding has fulfilled the predictions that auction markets will

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unreasonable or discriminatory, as long as all parties are fully apprised of the charge that is being assessed to the buyer." To fully apprise all parties, the ALJ's order states:

> Respondent Victor L. Kent and Sons, Inc., may use Tariff No. 2 subject to the requirement that schedules of its charges on the sale of consigned slaughter animals shall be so prepared, arranged and posted that consignors and buyers shall be fully apprised in advance of sales that a $10 per head charge will be assessed buyers additional to the prices bid on a per pound live weight basis; and all newspaper and other advertising, any flyers sent to consignors or buyers, all accounts of sale, and all sales invoices for consigned slaughter animals shall contain the legend, "No commission shall be (has been) deducted from the sales proceeds on animals sold for slaughter. Instead, a $10 per head charge is being collected from the buyer."

continue to be faced with the severe and continuing competition provided by direct sales.

The 1978 Amendment gave auction markets wide latitude to compete on rates, but fiduciary relationships must still be protected, and unjust, unreasonable and discriminatory tariffs must still be rejected. Perhaps, at the outset, the current tariff issues should be placed in context. A succinct treatment of this matter is taken from a pertinent textbook and is almost fully reproduced with footnotes herein in § III, *infra*. However, selected portions of the textbook, *without footnotes*, provide the background necessary for an initial understanding of this proceeding, as follows (see, Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law at §§ 3.33, 3.71, 3.74) (footnotes omitted), *supra*), and for a more complete rendition (with footnotes) see § III, *infra*):

§3.33 Livestock Marketing in the United States

The movement of livestock has undergone vast changes since the Packers and Stockyards Act was enacted. It varies widely in different regions of the country. . . .

Livestock marketing takes place either at public markets, i.e., terminal and auction stockyards, or in direct transactions (also referred to as country transactions), which include all livestock sales not at public markets.

When the act was enacted, most livestock moved through the great terminal stockyards, which were referred to in the landmark case of *Stafford v. Wallace* as the "throat" through which the "current of commerce" in livestock flowed. Today, however, packers purchase most of their slaughter cattle, hogs, and sheep away from public markets. Many feeder calves are also purchased by feeders away from public markets.

If the trend towards direct marketing continues, public markets could handle such a limited volume of livestock that they would no longer offer producers a viable alternative marketing method. When this situation occurred years ago in the poultry industry, poultry producers had very weak bargaining power. The pricing of an agricultural commodity also poses real problems when there is no public market to determine the proper level of prices.

. . . .

§3.71 Rate Regulation

Terminal stockyard operators, commission sellers at terminal stockyards, auction stockyard operators, and order buyers and brand inspection agencies operating at terminal or auction stockyards are

required to file their rates with the Packers and Stockyards agency and are subject to rate regulation. It is a violation of the act to charge a "greater or less or different compensation" for services than the rates in effect at the time, or to charge for feed or facilities not furnished.

Broad discretion is granted to the secretary as to rates since the only statutory standard is that rates be just, reasonable, and nondiscriminatory. Until recent years, it was the administrative practice to accept an initial tariff setting forth rates without examining the reasonableness of the rates. An initial tariff was challenged only if the rates were discriminatory. Any subsequent schedule increasing the rates was examined for reasonableness and discrimination. However, that administrative practice was changed as a result of an amendment to the act in 1978.

Policy Change Following 1978 Amendment

In 1978, Congress amended the rate regulatory provisions of the act to permit percentage (or value-based) tariffs, which are generally 3 per cent to 5 per cent of the sales price. This was a legislative reversal of a decision by the judicial officer the year before in the *Central Arkansas Auction Sale* rate case holding that there is a rebuttable presumption that value-based tariffs are discriminatory, since livestock shippers receiving the same services pay differing rates depending on the sales price of their livestock.

That statutory change would not have required a substantial change in the administrative practice, but the legislative history of the 1978 rate amendment expresses the congressional view that competition in livestock marketing channels will best serve the public interest in assuring the reasonableness of rates at public markets. As a result of that legislative history, the agency has dismissed all of the rate orders in effect except one, and the agency now reviews the reasonableness of rates only upon receipt of a valid complaint or under compelling circumstances.

. . . .

Effect of Policy Change

No doubt there will be a study at some future date to determine how effectively competition has held rates at a reasonable level. The judicial officer stated in the *Central Arkansas Auction Sale* rate case, referred to above:

> Based on discussions with leading livestock marketing experts throughout the United States from December 1962 to January 1971, during which time I was administrator of the Packers and Stockyards Act regulatory program, I believe that stockyard rates would double in the absence of rate regulation, thereby

substantially increasing marketing costs, to the detriment of producers and consumers.

Although the legislative history of the 1978 rate amendment states that "[a]uction markets are frequently located within close proximity to each other and aggressively compete with one another for livestock," as a general rule there is no aggressive competition between auction markets based on lower rates.

Under the free enterprise system, the cure for high rates is high rates. That is, high rates will attract additional markets which will then lead to lower rates. But that solution, if applied to the livestock industry, would be detrimental to producers and consumers. As explained in the *Central Arkansas Auction Sale* rate case, anyone is free to build a stockyard wherever or whenever he pleases. No franchise or certificate of public convenience and necessity is required. As a result, there are too many auction stockyards in some areas, leading to high unit costs and inefficiency. In addition, in an effort to maintain adequate volume to attract buyers, the auction owners may have to engage in extensive dealer operations to personally bring sufficient livestock to their markets to attract buyers. This results in the same animals moving through several auction markets during the period of a few days, causing undue stress to the animals and unnecessary marketing expenses.

The unnecessary proliferation of auction markets requires an increased number of buyers to cover the increased number of markets, which further adds to marketing costs. In some instances, it may result in too few buyers to provide adequate competition on the buying side.

High stockyard rates may also have a tendency to increase direct marketing of livestock, thereby further weakening the public marketing system. A stockyard operation would be just as profitable with higher rates and lower volume, but the public marketing system would suffer, to the detriment of producers (and consumers). Where there is no strong public marketing system, producers of agricultural commodities may have little bargaining power and pricing the commodity becomes quite a problem.

. . . .

§3.74 -- Rate Principles Applicable to Auction Stockyard Operators

The rate principles applicable to auction stockyard operators are set forth in detail in the *Central Arkansas Auction Sale* rate case and the *Giles Lowery Stockyards* rate case. These principles are different from the principles applicable to terminal stockyard operators since

> the investment in an auction stockyard is generally only a small percentage of the investment in the large terminal stockyards, and the great majority of the auction market owners actively work at their markets, deriving a large part of their stockyard income from the allowance computed by the Packers and Stockyards agency for a working owner.
>
> . . . .
>
> The reviewing courts held in the *Central Arkansas Auction Sale* rate case and the *Giles Lowery Stockyards* rate case that a reasonable rate is one that is not confiscatory in the constitutional sense. However, the judicial officer stated in both cases that with respect to auction stockyards, the due process clause of the Fifth Amendment to the Constitution does not require that every auction market owner be permitted to earn a reasonable return on the market's rate base, regardless of whether the market handles an adequate volume of livestock. Nonetheless, the judicial officer would not implement a rate policy that would drive the small inefficient auctions out of business unless the administrative officials of the Packers and Stockyards agency recommended such a policy.

Finally, the complainant's and respondent's arguments will be examined and analyzed, *seriatim*, in § § IV and V, respectively. The order follows thereafter.

There remain only two preliminary matters: burden of proof, and, the proper inferences from the facts which may be drawn by the Judicial Officer to support a reversal of an ALJ's decision and order.

First, it is well-settled that "during the administrative ratemaking proceeding, the burden of proof is, of course, on the complainant" (*In re Robertsdale Livestock Auction, Inc.*, 37 Agric. Dec. 1407, 1412 (1978)). Complainant's proof herein "far surpasses the preponderance of the evidence, which is all that is required" (*In re Welch*, 45 Agric. Dec. 1932, (1986)).

Second, it is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's, since they have the opportunity to see and hear the witnesses. However, the ALJ's findings are not sacrosanct, and I am entirely free to substitute my judgment for that of the hearing officer on all questions. It is important to note here that where there is the possibility of drawing two inconsistent inferences from the evidence, I am not prevented from drawing one. Also, the overruling of an ALJ's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. If my inferences are supported by substantial evidence, they cannot be set aside even though the reviewing court could draw a different inference. When I reach different or opposite results from the ALJ, the ALJ's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. Where I have overruled an ALJ's findings, in many cases, based upon credibility determinations, I have relied on documentary evidence or inferences from the facts. The points and authorities for this statement of law and practice on the reversal of an ALJ's findings were recently restated in *In re Collins*, 46 Agric. Dec. ____, slip op. at 15-18 (Mar. 4, 1987), as follows:

It is the consistent practice of the Judicial Officer to give great weight to the findings of fact by ALJ's since they have the opportunity to see and hear the witnesses testify (footnote omitted). When an agency *adopts* findings of fact by an ALJ based on credibility determinations, the task of the reviewing court is easier than when the agency overrules such findings, i.e., an ALJ's findings of fact based on credibility determinations, adopted by the agency, are almost unassailable. *Blackfoot Livestock Comm'n Co. v. USDA*, [810 F.2d 916, 920-21 (9th Cir. 1987)]. As stated in Davis, 3 *Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):

> When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952); *International Union v. NLRB*, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); *NLRB v. Stark*, 525 F.2d 422, 425-26 (2d Cir. 1975), *cert. denied* 424 U.S. 967 (1976); *NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976).

However, Professor Davis makes it clear that an agency is in a different position vis-a-vis an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*id.* at 327):

> Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses, and even despite the hearing officer's observation of the witnesses. The law that had been established before the APA continues: "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner." *NLRB v. Tex-O-Kan Flour Mills*, 122 F.2d 433, 437 (5th Cir. 1941).

Moreover, Professor Davis explains that an agency can overrule an ALJ's findings based on credibility determinations irrespective of whether a very substantial preponderance of the evidence supports the agency's decision. He states (*id.* at 332) that the "orthodox doctrine" consistent with Supreme Court decisions is set forth in *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S.

1105 (1975). Quoting from the court's decision rather than the abbreviated version in Professor Davis' treatise (*ibid.*):

> The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni, supra*. If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni, supra*.
>
> The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 138 U.S.App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. *OKC Corp. v. Federal Trade Commission*, 455 F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra*.

Accord Blackfoot Livestock Comm'n Co. v. USDA, [810 F.2d 916, 920-21 (9th Cir. 1987)].

In a recent case, the Judicial Officer reversed an ALJ's findings based on credibility determinations on the ground that the findings were "hopelessly incredible." *In re Ennes*, 45 Agric. Dec. [540, 548-55 (1986)]. However, that decision should not, of course, be construed as a voluntary decision to place a greater burden on the Department than is required, when the Judicial Officer overrules an ALJ's findings based on credibility determinations. In other cases, where the Judicial Officer has overruled an ALJ's findings based on credibility determinations, the Judicial Officer has merely relied on documentary evidence or inferences from the facts.

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6 *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. [1791, 1797-99 (1983)], *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Farrow*, 42 Agric. Dec. 1397, 1405-17 (1983), *aff'd in part and rev'd in part on other grounds*, 760 F.2d 211 (8th Cir. 1985); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 96-109, *aff'd*, 721 F.2d 1125 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 28-44 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-08 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished). See, also, *In re Muehlenthaler*, 37 Agric. Dec. 313, 330, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285-86 (1933); *Southern Nat'l Mfg. Co., v. EPA*, 470 F.2d 194, 197 (8th Cir. 1972); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972); *Nix v. NLRB*, 418 F.2d 1001, 1008 (5th Cir. 1969); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 742 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); Davis, *Administrative Law Treatise* § 10.04 (1958 & 1970 Supp.).

I. The Law of Agency Creates a Fiduciary Duty Running from the Auction Market, as Agent, to the Consignor, as Principal, and This Is Evident in the Restatement (Second) of Agency (1958).

This rate proceeding turns upon the most basic principles of the law of agency. Tariff No. 2 must be, and is, rejected, because it violates these basic principles. An examination of the fiduciary relation resulting between the consignors and the auction market reveals that respondent's tariff contemplates that respondent would act to some extent as an "order buyer" for the packers, collecting its entire fee for slaughter livestock from the buyers, yet, still hold itself out to consignors as their selling agent. Under the hornbook law of agency, a selling agent is duty bound to act *only* in the best interests of its principals (here the sellers) (*Restatement (Second) of Agency, infra*).

This duty of loyalty exists as a matter of law emanating from the agreement between the respondent and consignors, and operates as a legal consequence of the relationship, even if the parties do not call it "agency," and do not intend the legal consequences. The following excerpts from the *Restatement (Second) of Agency* (hereafter "*Agency 2d*") leave no room for doubt on these points. *Restatement (Second) of Agency* § § 1, 13, 14, 39, 61, 424 (1958) (emphasis added):

§ 1. Agency; Principal; Agent

(1) Agency is the *fiduciary relation* which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent.

Comment on Subsection (1):

. . . .

b. Agency a legal concept. Agency is a legal concept which depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking. The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow.

. . . .

Comment on Subsection (3):

e. "Agent" is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are those who, whether or not servants as described in Section 2, act in business transactions and those who perform only manual labor as servants. An agent may be one for whose physical acts the employer is responsible and who is called an independent contractor in order to distinguish him from a servant, also an agent, for whose physical acts the employer is responsible. Thus, the attorney-at-law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions, are agents, although as to their physical activities they are independent contractors.

. . . .

§ 13. Agent as a Fiduciary

An agent is a fiduciary with respect to matters within the scope of his agency.

Comment:

a. Existence and effect of fiduciary duties. The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking. Among the agent's fiduciary duties to the principal is the duty to account for profits arising out of the employment, the duty not to act

as, or on account of, an adverse party without the principal's consent, the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them.

. . . .

c. The facts in each case must be considered in determining whether or not it is understood that the primary obligation of one party is to act for the benefit of the other. The name which the parties give to the relation is not determinative.

. . . .

§ 14. Control by Principal

A principal has the right to control the conduct of the agent with respect to matters entrusted to him.

Comment:

. . . .

b. If it is otherwise clear that there is an agency relation, as in the case of recognized agents such as attorneys at law, factors, or auctioneers, the principal, although he has contracted with the agent not to exercise control and to permit the agent the free exercise of his discretion, nevertheless has power to give lawful directions which the agent is under a duty to obey if he continues to act as such.

. . . .

§ 39. Inference That Agent is to Act Only for Principal's Benefit

Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal.

Comment:

a. Authority is conferred to carry out the purposes of the principal and not those of someone else. These purposes, as manifested to the agent, constitute the benefit for which, as the agent should realize, the agency is created. In business enterprises, an agent normally has no authority to seek personal advantage otherwise than through the faithful performance of his duties, nor to conduct his principal's business with a mind to the benefit of others.

. . . .

§ 61. Amount of Price to be Paid or Received

(1) Unless otherwise agreed, authority to buy or sell with no price specified in terms includes authority to buy or sell at the market price if any; otherwise at a reasonable price.

(2) Unless the agent has notice that the principal has a fixed-price policy or unless other facts indicate that the principal's directions are to be followed implicitly, an agent authorized to buy or sell at a fixed price or at the market price is authorized to buy or sell at a price more advantageous to the principal.

Comment:

(a) . . . If there is a definite market price, there is apparent authority in such cases to buy or sell only at that price or at one more advantageous to the principal. . . . Compare Section 424, which treats of the duty of an agent to his principal. (*Infra*).

Comment on Subsection (1):

b. Whether or not there is a market price and, if not, what is a reasonable price, are questions of fact to be determined in view of all the circumstances. Ordinarily, land has no definite market price; the range within which a price is considered reasonable is wide. On the other hand, the price range for chattels frequently sold, even in the absence of a definite market price, is ordinarily narrow. . . .

c. If the agent is entitled to deduct his commission from the amount to be paid by or to the principal, he is ordinarily authorized to purchase for an amount more than that directed or to sell for an amount less if he makes a corresponding deduction from his commission; unless the principal has a fixed price policy, the principal is interested only in the net amount paid or received.

Comment on Subsection (2):

d. Ordinarily, where the price is fixed by the buyer, he intends it as the maximum price to be paid by the agent; except in sales at retail by business organizations, the price named by the seller is usually intended as the minimum price. In both cases, the agent is usually expected to use discretion in obtaining better terms and, if so, it would be a breach of duty to his principal for him to . . . sell for less than that which he should know is acceptable to the third person.

. . . .

§ 424. Agents to Buy or to Sell

Unless otherwise agreed, an agent employed to buy or to sell is subject to a duty to the principal, within the limits set by the principal's directions, to be loyal to the principal's interests and to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal.

Comment:

. . . .

b. Price. The duty to obtain the terms most advantageous to the principal exists even though the principal has fixed the price at which the agent is to buy or to sell, except when the principal has specifically directed the agent not to depart from the price fixed, or when the agent should know that the principal has a fixed price policy. . . . In the case of a commodity which has fluctuating value, the agent must exercise reasonable discretion in buying or selling it at such time as is most favorable in obtaining the best price, unless he has been instructed otherwise. Normally, he is expected to act in accordance with the customs of his business. . . .

. . . .

c. Elections of principal. In accordance with the rule stated in Section 407, an agent who violates a duty to his principal in selling the principal's things or in purchasing things with the principal's money or upon the principal's credit is subject to liability to him for any damage to the principal's business thereby caused and, in addition, if he has received something, he is subject to liability for what he has received, its value or its proceeds. . . .

A transaction by the agent may be improper because of the violation of one or more of the duties of the agent to the principal. The following paragraphs state some of the typical situations.

f. Sale or purchase of subject matter not authorized. The violation of duty by the agent may consist of an improper sale to a third person of something which the agent had no authority to sell. . . . Whether or not the principal has received the proceeds of sale, if the agent improperly received a bonus for making it, the principal is entitled to the bonus.

. . . .

g. Sale or purchase at improper price. The violation of duty by the agent may be selling to a third person at too low a price something which he is otherwise authorized to sell. In this case, the principal is entitled to recover the thing in specie or its value from the purchaser, if the agent had no power to bind the principal. Whether or not the transaction was binding upon the principal as to the purchaser, the principal is entitled to recover from the agent the difference between the amount received and the value of the property sold at the time of sale, or its highest value within a reasonable time after the principal acquires notice of the sale, whichever is larger; or the amount which the agent would have received if he had obeyed the principal, with interest from the time of sale; or, if the agent has improperly received a bonus for making the sale, the amount which the agent has so received. If the sale is not otherwise improper, there are no other elements of damage, but if the sale is improper for other reasons, as where a sale is made at a low price to a competitor, thereby harming the principal's business, the principal is entitled to recover from the agent the damages for the harm.

. . . .

h. Sale or purchase otherwise improper. If an agent is authorized to sell, and sells at the authorized price, but the sale is improper for some other reason, so that as between the principal and the agent the principal can avoid the transaction, the principal can return to the agent what he has received and recover from the agent the value of what was sold, with interest from the time of sale or the profits which the thing sold would have realized if the sale had not been made. In the alternative, the principal can retain what he has received and recover what the agent received, if anything, as an inducement for the sale. In either event, the principal is entitled to damages for the harm caused to his business by the sale.

Agency 2d defines agency, in its very first section, as a "fiduciary relation" based upon consent, where one person acts on behalf of another. (*Agency 2d*, § 1, *supra*). The one who is to act is the agent (*Id.* at § 1(3)). Agency is a "legal concept" based upon acceptance and understanding between the parties, by agreement (not necessarily by contract), which results in a "factual" relationship between them, regardless of whether the parties intended the agency, called it "agency," or sought the legal consequences thereof (*Agency 2d*, § 1 Comment on Subsection (1), *supra*).

Apropos this rate proceeding, *Agency 2d* specifically comments that "the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions, are agents, although as to their physical activities they are independent contractors" (*Agency 2d*, § 1(3) Comment on Subsection (3) (emphasis added)).

Insofar as there is testimony and argument herein whether the respondent is indeed a "fiduciary," *Agency 2d* is specific that an "[a]gent is a fiduciary with respect to matters within the scope of his agency" (*Agency 2d*, § 13, *supra*)

(emphasis added). Moreover, the agreement between the parties "causes the agent to be a fiduciary" creating a duty "to act primarily for the benefit of" the principal, which includes "the duty to account for profits arising out of the employment, the duty not to act as, or on account of, an adverse party without the principal's consent, the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them" (*Id.* at Comment a).

The fiduciary duty formed by the consignor-auctioneer relationship is so powerful that the principal retains "the right to control the conduct of the agent" even though the agent has been given free exercise of discretion (*Agency 2d*, § 14, *supra*). Auctioneers are included as "recognized agents" over which the principal retains such control. As stated in *Agency 2d*, § 14, Comment b (emphasis added):

> b. If it is otherwise clear that there is an agency relation, as in the case of recognized agents such as attorneys at law, factors, or auctioneers, the principal, although he has contracted with the agent not to exercise control and to permit the agent the free exercise of his discretion, nevertheless has power to give lawful directions which the agent is under a duty to obey if he continues to act as such.

These principles give rise to the "inference" that the agent only has "authority to act for the benefit of the principal," unless otherwise agreed (*Agency 2d*, § 39, *supra*). This means that the agent may only act for the purpose of the principal and "not those of someone else"; which means that the "agent normally has no authority to seek personal advantage . . . nor to conduct his principal's business with a mind to the benefit of others" (*Id.* at Comment a).

Regarding the price of the chattels to be sold, a principal, unless otherwise authorized, has limited authority, and must generally "sell at a fixed price or at the market price," but is "authorized to buy or sell at a price more advantageous to the principal" (*Agency 2d*, § 61(2), *supra*). Importantly, "[i]f there is a definite market price, there is apparent authority in such cases to buy or sell only at that price or at one more advantageous to the principal. . . ." (*Agency 2d*, § 61 Comment (a), *supra*). "[T]he price range for chattels frequently sold, even in the absence of a definite market price, is ordinarily narrow. . . ." (*Agency 2d*, § 61 Comment on Subsection (1)b, *supra*). Where an "agent is entitled to deduct his commission from the amount to be paid . . . to the principal," the agent may "ordinarily" sell for an amount less if he makes a corresponding deduction from his commission . . ." (*Id.* at c). "Ordinarily, . . . the agent is usually expected to use discretion in obtaining better terms and, if so, it would be a breach of duty to his principal for him to . . . sell for less than that which he should know is acceptable to the third person." (*Agency 2d*, § 61 Comment on Subsection (2)d, *supra*) (emphasis added).

An agent must be loyal to the principal's interests, when employed to sell, and owes a duty "to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal" (*Agency 2d*, § 424, *supra*). Regarding price, this includes the duty "to obtain the terms most advantageous to the principal" even when there is a "fixed price policy" (*Id.* at Comment b). This means that, unless otherwise instructed, "[i]n the case of a commodity which has a fluctuating value, the agent must exercise reasonable discretion in . . . selling it at such time as is most favorable in obtaining the best price," which is to say, "[n]ormally, he is expected to act in accordance with the customs of his business . . ." (*Id.*) (emphasis added).

An agent who violates this duty of loyalty is "subject to liability [to the principal] . . . for any damage to the principal's business thereby caused, and, in addition, if he has received something, he is subject to liability for what he has received, its value or its proceeds . . ." (*Agency 2d*, § 424 Comment c, *supra*).

Agency 2d recognizes that an agent may breach a duty of loyalty by "selling to a third person at too low a price something which he is otherwise authorized to sell," and "if the agent has improperly received a bonus for making the sale, the amount which the agent has so received" belongs to the principal. Moreover, "if the sale is improper for other reasons, as where a sale is made at a low price to a competitor, thereby harming the principal's business, the principal is entitled to recover from the agent the damages for the harm" (*Id.* at Comment g) (emphasis added).

Finally, *Agency 2d* spells out the remedy where the sale by the agent *is otherwise improper*, as where there is an *inducement* for the sale. In this type context, the sale is authorized, and the price is authorized, *but the impropriety lies in the inducement for the sale.* The principal can void this type of transaction, recovering the value of the thing sold, with interest, or the profit from a sale, which could have occurred had the thing not been improperly sold. "In the alternative, the principal can retain what he has received and recover what the agent received, if anything, as an inducement for the sale" (*Id.* at Comment h, *supra*) (emphasis added).

II. The Law of Agency Is Routinely Applied within the Mandates, Purposes and Objectives of the Packers and Stockyards Act, Inter Alia, to Protect Farmers and Ranchers and to Ensure that They Do Not Receive Less than Full Value for Their Livestock.

Agency 2d is often cited in Packers and Stockyards Act proceedings to sort through the behavior of livestock marketers, in the Department's continuing effort to protect farmers and ranchers and ensure that they do not receive less than full value for their livestock. In *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 88e (Mar. 19, 1987), *aff'd*, No. 87-7189 (9th Cir. Mar. 8, 1988), it is made clear that no other circumstances need be considered to determine agency, when there is an express agreement between two persons that one is to act as the agent of the other, as follows (emphasis added):

> Since I believe the testimony of the three feeder witnesses as to their agreement with Mike Donaldson, there is no need for me to consider other circumstances indicative of an agency relationship. That is, if there is an express agreement between two persons that one is to act as the agent of the other, an agency relationship is formed, and there is no need to consider whether other circumstances point in the direction of an agency relationship or a dealer transaction. *Restatement (Second) of Agency*, § § 1, 14K, 15, 26 (1958).

The agency relationship, and its concomitant fiduciary duty, is the bedrock upon which the P&SA builds implementation of the clear will of Congress, expressed in the objectives of the Act, that farmers and ranchers not receive less than the true market value of their livestock. In *In re Welch*, 45 Agric. Dec. 1932, 1949-50 (1986), this extremely important objective of the Act is analyzed, and set forth with a poignant quotation from *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95, 102 (D. Minn. 1945) (3-judge court). These cases make it abundantly clear that Congress intended that a marketing agency maintain absolute loyalty to its shippers. Moreover, a marketing agency's sole objective should be *to sell at the highest price available* on an open, competitive market. It is clear that when the agency acquires an interest, other than agent, it no longer can honestly and efficiently represent the principal. The quotation in *Welch* reads as follows (*Welch, supra*, at 1949-50) (emphasis added):

> In the present case, the record supports the ALJ's finding that in a number of private treaty transactions, Michael Benson, in the course of his employment as a commission firm salesman, "sold consigned livestock to respondent Welch at substantially less than full market value of the livestock" (Initial Decision at 3). That violated one of the main objectives of the Act, which "is to safeguard farmers and ranchers against receiving less than the true market value of their livestock" (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 1 (1957), *reprinted in* [1958] U.S. Code Cong. & Ad. News 5212, 5213. *See Glover Livestock Comm'n Co., v. Hardin*, 454 F.2d 109, 113 (8th Cir. 1972), *rev'd on other grounds*, 411 U.S. 182 (1973); *Bruhn's Freezer Meats of Chicago, Inc. v. U.S.D.A.*, 438 F.2d 1332, 1337-38 (8th Cir. 1971).
>
> Even if there had been no proof that Benson sold consigned livestock to Welch at less than the full market value, or purchased livestock consigned by Welch at more than the full market value (to fill Benson's employer's purchase orders), the mere fact that there was a transfer of funds from Welch to Benson in connection with transactions at the stockyard placed Benson in a conflict-of-interest situation, which is a very serious violation of the Act. As stated in *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 95, 102 (D. Minn. 1945) (3-judge court):

> The producer consigns his livestock to a market agency to represent him as his agent and who is supposed to have no interest except the welfare of his principal. Accordingly, the producer places his financial interests in the absolute control of his agent. Consequently, the success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends on the integrity and ethics of those engaged in marketing livestock is speaking mildly. Experience long ago taught that stockyards require some sort of supervision and Congress has lodged it in the Department of Agriculture under the Act of 1921, as amended, obviously because a major portion of the great agricultural industry of the country is vitally concerned.
>
> . . . .
>
> The methods of transacting business in the yards constantly are a temptation to collusion. Sales of livestock are made by negotiation and bargaining, and not at public auction. The purchaser is present; the shipper is not, but relies on his market agency. The agent is in closest contact with buyers for packers, with speculators and traders and perhaps has dealt with these same persons for many years; so, in accordance with human instincts, ways and means are found to profit at the expense of the absent member to the transaction. A marketing agency should maintain a position at all times which would assure absolute loyalty to its shippers. No interest should be allowed to interfere between the agent and his principal. When an agency receives a consignment of livestock, the sole objective should be to sell it at the highest price obtainable on an open, competitive market. When the agency acquires an interest, other than agent, it no longer can honestly and efficiently represent the principal.

A commission firm employee is in a fiduciary relationship to the firm's principals, and owes the highest degree of loyalty to the firm's principals.[7] Respondent Michael Benson engaged in a very serious violation by entering into an arrangement with Doug Welch that necessarily and inherently created a conflict-of-interest situation.

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[7] *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 94-102 (D. Minn. 1945) (3-judge court); *In re Saylor*, 44 Agric. Dec. [2238, 2395 (1985)] (decision on remand); *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 211-12 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 829 (1979).

Moreover, in the *Spencer* decision, it is emphasized that when a fiduciary violates his duty with respect to prices, the fiduciary defeats the primary purpose of the Act. *Spencer* states (*Spencer, supra*, slip op. at 198-200) (additional emphasis added):

> Respondents waste five pages of their brief on appeal (10% of the brief) arguing the absurd proposition that even if respondents violated the Act as found by the ALJ, nonetheless, the violations were not serious because the Act is concerned only with safeguarding sellers, protecting consumers, and protecting the industry from unfair practices of competitors (Appeal Brief at 38-43). In support of their argument, respondents quote two sentences from the legislative history of the 1958 amendments to the Act. However, the sentence immediately preceding that quoted by respondents destroys respondents' argument. The legislative history relied on by respondents, including the first two sentences of the paragraph omitted by respondents, is as follows (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 1 (1957), *reprinted in* 1958 U.S. Code Cong. & Ad. News 5212, 5213; emphasis supplied):
>
> PRINCIPAL PROVISIONS OF THE ACT
>
> The Packers and Stockyards Act was enacted by Congress in 1921. The primary purpose of this Act is to assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry. The objective is to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc. Protection is also provided to members of the livestock marketing and meat industries from unfair, deceptive, unjustly discriminatory, and monopolistic practices of competitors, large or small.

Hence the "primary purpose" of the Act is to assure not only fair competition, but, also, "fair trade practices in livestock marketing" and meat packing. Accordingly, when a fiduciary buying livestock on a commission basis defrauds his principals with respect to prices and weights, the violations defeat the "primary purpose" of the Act. [53]

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[53] Although some cases hold that certain types of violations of the Act require proof of predatory intent or proof that the practice is likely to result in injury to competition (e.g., *Armour & Co. v. United States*, 402 F.2d 712, 712-23 (7th Cir. 1968)), other cases recognize that other types of violations require no such proof (e.g., *Bosma v. USDA*, 754 F.2d 804, 809 (9th Cir. 1984) (failure of auction operator to inform consignors that he was the actual purchaser of their livestock is "inherently unfair," and "it may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm"); *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465, 1469-70 (NDNY 1984) (§ 202(a) of the Act prohibiting "unfair" or "deceptive" practices by packers does not require proof of injury to competition; it is sufficient to show that cattle were short weighed); *In re Corn State Meat Co.*, 45 Agric. Dec. [995, 1019-28 (1986)]; *In re ITT Continental*

Baking Co., 44 Agric. Dec. [748, 781-83 (1985)] (remand order), *final order*, 44 Agric. Dec. [1971 (1985)] (consent order); *In re Farrow*, 42 Agric. Dec. 1397, 1422-29 (1983), *aff'd in part & rev'd in part*, 760 F.2d 211 (8th Cir. 1985) (merits affirmed; suspension order reversed).

The broad scope of the Packers and Stockyards Act was recognized in 1921 as follows (H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921)):

> A careful study of the bill, will, I am sure, convince one that it, and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial [sic], supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.

Furthermore, Congress has repeatedly broadened the Secretary's regulatory authority under the Act. In 1924, the Act was broadened to authorize the Secretary to suspend registrants and require bonds of registrants (Act of June 5, 1924, Pub. L. No. 201, 43 Stat. 460, codified at 7 U.S.C. § 204). The Act was broadened to cover live poultry dealers or handlers in 1935 (Act of Aug. 14, 1935, Pub. L. No. 272, § 503, 49 Stat. 649, codified at 7 U.S.C. § § 192, 218b, 221, 223). In 1958, the Act was broadened to give the Secretary "jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size" (H.R. Rep. No. 1048, 85th Cong., 1st Sess. 5 (1957), *reprinted in* 1958 U.S. Code Cong. & Ad. News 5212, 5216). In 1976, the Act was broadened to authorize packer-bonding, temporary injunctions, and civil penalties; to require prompt payment of packers, market agencies, and dealers; and to eliminate the requirement that the Secretary prove that each violation occurred "in commerce" (Act of Sept. 13, 1976, Pub. L. No. 94-410, 90 Stat. 1249).

From the foregoing, it is clear that Congress has, over the years, recognized the need to assure fair trade practices in the livestock marketing industry in view of the nature of the industry and its importance to the national economy. Any commission buyer who defrauds principals in fiduciary transactions has committed one of the most serious violations that can be committed under the Act.

In a very recent affirmation of these points and authorities, the Ni Circuit specifically affirmed *Spencer's* interpretation of the Act, clarif fiduciaries' responsibilities to principals, and affirming fair trade practice the primary purpose of the Act, as follows (*Spencer Livestock Commiss Co. v. Department of Agriculture*, No. 87-7189, slip op. at 2848-49 (9th Mar. 8, 1988)):

Petitioners maintain that the ALJ erred in finding their conduct illegal under § 213 because their conduct did not threaten any of the interests the Act seeks to protect. They identify these interests as safeguarding sellers, protecting consumers, and protecting the industry from unfair practices of competitors. Petitioners stress "of competitors" as though the Act were nothing more than a mirror of the antitrust laws. They argue that since in none of the 17 transactions did the sales price exceed the prevailing market price, there was neither harm nor threat of harm to consumers.

The JO rejected this line of argument by finding that "[e]ven if true, that fact would be irrelevant. An agent who secretly increases the weights and prices of livestock purchased on a commission basis for principals commits very serious violations of the Act even if the invoice prices to the principals are at or below the market." We rejected a similar argument in *Bosma*, where we found an average profit of $100 per head "sufficient evidence to support the J.O.'s conclusion that Bosma did not pay his consignors a fair price, regardless of whether they were satisfied with what they got." *Bosma*, 754 F.2d at 809.

Petitioners further characterize the feeders' belief that they were operating on commission as a "misconception," and assert that in the absence of proof of an anti-competitive effect, the Department should leave feeders to protect themselves against such "misconceptions" by insisting on written contracts.

This argument relies on an incomplete understanding of the objectives of the Act. The primary purpose of the Act was "to assure fair competition and *fair trade practices* in livestock marketing. . . ." H.R. Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213 (emphasis added). It was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics. Thus, under the *Central Coast* rule, we uphold a finding of a § 213 violation where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors.

Petitioners *plainly* practiced deception. . . .

III. Although the Legislative History of the Act Requires Rate Competition, Rather than Ratemaking by the Department, the Secretary Must, Nonetheless, Determine if a Rate Is Unjust, Unreasonable or Discriminatory, and against this Standard Tariff No. 2 Must Be Rejected.

The legislative history of USDA ratemaking in livestock marketing is reprinted from *Campbell*, note 1, *supra*. When read in the context of the law of agency (see, § I, *supra*) and the pertinent decisions (see § II, *supra*), Tariff No. 2 is unjust, unreasonable, and discriminatory (see § IV, *infra*).

The quotation from *Campbell*, note 1, *supra*, is as follows:

§3.33 Livestock Marketing in the United States

The movement of livestock has undergone vast changes since the Packers and Stockyards Act was enacted. It varies widely in different regions of the country. A typical calf might remain on the ranch where it was born and be raised by a "cow-calf" cattle producer until it is about 500 pounds; then be sold to a "warmup" cattle feeder where it is fed on a high roughage ration to 700 or 800 pounds; and finally be finished on high concentrate rations in a farmer feedlot, custom feedlot, or packer feedlot until it is ready for slaughter at 1,000 to 1,100 pounds.[246]

246 For a description of cattle feeding and raising, *see* ERS, USDA, Ag Ec Rep No 235, Cattle Raising in the United States (Jan 1973); ERS, USDA, Ag Ec Rep No 186, Cattle Feeding in the United States (Oct 1970).

Livestock marketing takes place either at public markets, i.e., terminal and auction stockyards, or in direct transactions (also referred to as country transactions), which include all livestock sales not at public markets.

When the act was enacted, most livestock moved through the great terminal stockyards, which were referred to in the landmark case of *Stafford v Wallace* [247] as the "throat" through which the

247 258 US 495, 516 (1922) (sustaining the constitutionality of the Packers and Stockyards Act under the commerce power, at 515-28).

"current of commerce" in livestock flowed. Today, however, packers purchase most of their slaughter cattle, hogs, and sheep away from public markets. [248] Many feeder calves are also purchased by feeders away from public markets.

248 P&S, AMS, USDA, Vol XVII, No 3, Packers and Stockyards Resumé, Table 2, at 7 (Dec 28, 1979). Packers still purchase most of their calves at public markets. *Id.*

If the trend towards direct marketing continues, public markets could handle such a limited volume of livestock that they would no longer offer producers a viable alternative marketing method. When this situation occurred years ago in the poultry industry, poultry producers had very weak bargaining power. [249] The pricing of an

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249 National Commission on Food Marketing, Food from Farmer to Consumer 24 (1966); P&SA, USDA, P&SA-1, The Broiler Industry iii-v (summary), 1-2, 45-47, 63 (1967).

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agricultural commodity also poses real problems when there is no public market to determine the proper level of prices. (Footnote omitted.)

. . . .

§3.71 Rate Regulation

Terminal stockyard operators, commission sellers at terminal stockyards, auction stockyard operators, and order buyers and brand inspection agencies operating at terminal or auction stockyards are required to file their rates with the Packers and Stockyards agency and are subject to rate regulation. [590] It is a violation of the act

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590 7 USC §§ 206, 207, 211, 217a. The regulations as to tariffs previously in 9 CFR §§ 201.19-.26 were removed, and new requirements were established, in 1984. 49 Fed Reg 33001, 33003 (1984), to be codified at 9 CFR § 201.17. The new requirements are applicable to brand inspection agencies. *Id* 33004, to be codified at 9 CFR § 201.86(b). The policy statement as to rates and charges in 9 CFR § 203.17 was also revised in 1984. *Id* 33004.

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to charge a "greater or less or different compensation" for services than the rates in effect at the time, [591] or to charge for feed or facilities not furnished. [592]

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591 7 USC § 207(f); Bowman v USDA, 363 F2d 81, 84, 86 (5th Cir 1966); *In re* Loretz, 36 Agric Dec 1087, 1099 (1977); *In re* Giles Lowery Stockyards, Inc, 35 Agric Dec 267, 305 (1976), *affd*, 565 F2d 321 (5th Cir 1977), *cert denied*, 436 US 957 (1978).

592 Daniels v United States, 242 F2d 39, 41-42 (7th Cir), *cert denied*, 354 US 939 (1957).

Broad discretion is granted to the secretary as to rates since the only statutory standard is that rates be just, reasonable, and nondiscriminatory. [593] Until recent years, it was the administrative

[593] 7 USC §§ 206, 211 (Supp III 1979). The broad delegation of authority does not constitute an invalid delegation of legislative authority. *See* Sunshine Anthracite Coal Co v Adkins, 310 US 381, 398 (1940).

practice to accept an initial tariff setting forth rates without examining the reasonableness of the rates. An initial tariff was challenged only if the rates were discriminatory. Any subsequent schedule increasing the rates was examined for reasonableness and discrimination. However, that administrative practice was changed as a result of an amendment to the act in 1978.

Policy Change Following 1978 Amendment

In 1978, Congress amended the rate regulatory provisions of the act to permit percentage (or value-based) tariffs, which are generally 3 per cent to 5 per cent of the sales price. [594] This was a legislative reversal of a decision by the judicial officer the year before in the

[594] Act of Oct 2, 1978, Pub L No 95-409, § 1, 92 Stat 886 (7 USC §§ 206, 211 (Supp III 1979)).

Central Arkansas Auction Sale rate case [595] holding that there is a rebuttable presumption that value-based tariffs are discriminatory, since livestock shippers receiving the same services pay differing rates depending on the sales price of their livestock.

[595] *In re* Central Ark Auction Sale, Inc, 37 Agric Dec 570, 641-43 (1977), *affd*, 570 F2d 724 (8th Cir), *cert denied*, 436 US 957 (1978).

That statutory change would not have required a substantial change in the administrative practice, [596] but the legislative history

[596] For a discussion of how rate orders might be issued under value-based tariffs, see *In re* Robertsdale Livestock Auction, Inc, 37 Agric Dec 1407, 1413-14 (1978).

of the 1978 rate amendment expresses the congressional view that competition in livestock marketing channels will best serve the public interest in assuring the reasonableness of rates at public markets. [597] As a result of that legislative history, the agency has dismissed all of

[597] S Rep No 95-1053, 95th Cong, 2nd Sess 3 (1978); HR Rep No 95-1337, 95th Cong, 2nd Sess 3-4 (1978).

the rate orders in effect [598] except one, [599] and the agency now reviews the reasonableness of rates only upon receipt of a valid complaint or under compelling circumstances. [600]

[598] E.g., *In re* Mills, 37 Agric Dec 1902 (1978), in which the rate order was dismissed "for reasons set forth more fully in Complainant's Response to Respondent's Petition to Vacate Report and Decision." The agency response referred to states (Complainant's Response at 1, P&S Doc No 5151, Nov 22, 1978):

> (1) Notice of respondents' petition was published in the Federal Register on Friday, November 3, 1978 (43 F.R. 51434).
>
> (2) No responses were filed by interested persons with the Hearing Clerk, U.S. Department of Agriculture within the comment period ending November 20, 1978.
>
> (3) Complainant agrees, that absent adverse public comment, the prescription of stockyard rates and charges by order of the Secretary of Agriculture would be contrary to the spirit of, if not the language of, the recent amendments to the Act and the policy statements issued thereunder, P.L. 95-409; 9 CFR 203.11, 203.17 (43 F.R. 46494, 46955).

[599] The one order in effect would likely be terminated if the auction operator so requested.

[600] 9 CFR § 203.17(b). 9 CFR § 203.17(b) was slightly reworded, and the provisions formerly in 9 CFR § 203.17(c), (f) were removed, effective September 19, 1984. 49 Fed Reg 33001, 33004 (1984).

The extent of the change in administrative practice is reflected by the fact that the agency no longer has a separate Rates, Services, and Facilities Branch; the agency amended its regulations so that it no longer requires supporting data to accompany a rate increase; [601] the agency revoked its policy statement under which rate orders

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[601] 9 CFR § 201.25. 9 CFR § 201.25 was removed and replaced by revised 9 CFR § 201.17(a), effective September 19, 1984. 49 Fed Reg 33001, 33003 (1984).

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remained in effect for at least 10 years; [602] and the agency revoked its rules of practice applicable to rate hearings, [603] stating:

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[602] 43 Fed Reg 46955, 46956 (1978), revoking 9 CFR § 203.11.

[603] 44 Fed Reg 72575 (1979), revoking 9 CFR §§ 202.1-.38.

> In October 1978 the Department's control of rates and charges at posted stockyards was reduced to the point that it is unlikely a rate proceeding will be instituted in the immediate future. Therefore, issuance of new rules at this time would be inappropriate. If, however, in the future it becomes necessary to institute a rate proceeding, rules will be adopted at that time. [604]

604 44 Fed Reg 50847 (1979).

Effect of Policy Change

No doubt there will be a study at some future date to determine how effectively competition has held rates at a reasonable level. The judicial officer stated in the *Central Arkansas Auction Sale* rate case, referred to above:

> Based on discussions with leading livestock marketing experts throughout the United States from December 1962 to January 1971, during which time I was administrator of the Packers and Stockyards Act regulatory program, I believe that stockyard rates would double in the absence of rate regulation, thereby substantially increasing marketing costs, to the detriment of producers and consumers. [605]

605 *In re* Central Ark Auction Sale, Inc, 37 Agric Dec 570, 614 (1977), *affd*, 570 F2d 724 (8th Cir), *cert denied*, 436 US 957 (1978).

Although the legislative history of the 1978 rate amendment states that "[a]uction markets are frequently located within close proximity to each other and aggressively compete with one another for livestock," [606] as a general rule there is no aggressive competition between auction markets based on lower rates.

606 S Rep No 95-1053, 95th Cong, 2d Sess 3 (1978).

Under the free enterprise system, the cure for high rates is high rates. That is, high rates will attract additional markets which will then lead to lower rates. But that solution, if applied to the livestock industry, would be detrimental to producers and consumers. As explained in the *Central Arkansas Auction Sale* rate case, [607] anyone is free to build a stockyard wherever or whenever he pleases.

607 *In re* Central Ark Auction Sale, Inc, 37 Agric Dec 570, 616-19 (1977), *affd*, 570 F2d 724 (8th Cir), *cert denied*, 436 US 957 (1978).

No franchise or certificate of public convenience and necessity is required. As a result, there are too many auction stockyards in some areas, leading to high unit costs and inefficiency. In addition, in an effort to maintain adequate volume to attract buyers, the auction owners may have to engage in extensive dealer operations to personally bring sufficient livestock to their markets to attract buyers. This results in the same animals moving through several auction markets during the

period of a few days, causing undue stress to the animals and unnecessary marketing expenses.

The unnecessary proliferation of auction markets requires an increased number of buyers to cover the increased number of markets, which further adds to marketing costs. In some instances, it may result in too few buyers to provide adequate competition on the buying side.

High stockyard rates may also have a tendency to increase direct marketing of livestock, thereby further weakening the public marketing system. A stockyard operation would be just as profitable with higher rates and lower volume, but the public marketing system would suffer, to the detriment of producers (and consumers). Where there is no strong public marketing system, producers of agricultural commodities may have little bargaining power [608] and pricing the commodity becomes quite a problem. (Footnote omitted.)

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608 National Commission on Food Marketing, Food from Farmer to Consumer 24 (1966); P&SA, USDA, P&SA-1, The Broiler Industry iii-v (summary), 1-2, 45-47, 63 (1967).

Rate Regulation

Since the Department may resume active rate regulation at stockyards at some future date, or may respond to a rate complaint, the general rate principles followed by the Packers and Stockyards agency may be of more than historical interest. The rate principles followed for the different types of activities at stockyards are set forth briefly in §§ *3.72-3.74.* These rate principles are not subject to challenge merely because they were not initially proposed and adopted in a rule making context. [610]

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610 Central Ark Auction Sale, Inc v Bergland, 570 F2d 724, 726-27 (8th Cir), *cert denied*, 436 US 957 (1978); Giles Lowery Stockyards, Inc v Dept of Agric, 565 F2d 321, 325-26 (5th Cir 1977), *cert denied*, 436 US 957 (1978); *In re* Robertsdale Livestock Auction, Inc, 37 Agric Dec 1407, 1409 (1978).

A rate hearing may be instituted upon a complaint or on the secretary's own initiative. [611] The Packers and Stockyards agency has the burden of proof in a rate proceeding. [612]

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611 7 USC § 211 (Supp III 1979). The Packers and Stockyards agency does not have to prepare an inflation impact statement or an environmental impact statement in a rate proceeding. *In re* Robertsdale Livestock Auction, Inc, 37 Agric Dec 1407, 1409 (1978).

612 *In re* Robertsdale Livestock Auction, Inc, 37 Agric Dec 1407, 1411-12 (1978).

Whenever a schedule is filed stating a new rate, the Packers and Stockyards agency may suspend the operation of the rate schedule for up to 60 days pending a hearing, but thereafter the new rate goes into effect until changed by the regulated person or the judicial officer. [613] Under the 1978 amendment, the judicial officer may

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[613] 7 USC § 207(e).

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enter an order after hearing setting forth the rate to be thereafter observed as the maximum or minimum, or both. [614] If there is an

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[614] 7 USC § 211(a) (Supp III 1979). Previously the act provided for a rate order to be observed as "both the maximum and minimum to be charged." 7 USC § 211(a).

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appeal from the judicial officer's order, he may refuse to issue a stay order pending appeal unless an escrow arrangement is established. [615]

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[615] *In re* Robertsdale Livestock Auction, Inc, 37 Agric Dec 1407, 1408 (1978).

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§3.74 -- Rate Principles Applicable to Auction Stockyard Operators

The rate principles applicable to auction stockyard operators are set forth in detail in the *Central Arkansas Auction Sale* rate case [631] and the *Giles Lowery Stockyards* rate case. [632] These principles are

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[631] *In re* Central Ark Auction Sale, Inc, 37 Agric Dec 570 (1977), *affd*, 570 F2d 724 (8th Cir), *cert denied*, 436 US 957 (1978).

[632] *In re* Giles Lowery Stockyards, Inc, 35 Agric Dec 267 (1976), *affd*, 565 F2d 321 (5th Cir 1977), *cert denied*, 436 US 957 (1978).

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different from the principles applicable to terminal stockyard operators since the investment in an auction stockyard is generally only a small percentage of the investment in the large terminal stockyards, and the great majority of the auction market owners actively work at their markets, deriving a large part of their stockyard income from the allowance computed by the Packers and Stockyards agency for a working owner. [633]

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[633] *In re* Central Ark Auction Sale, Inc, 37 Agric Dec 570, 615-16 (1977), *affd*, 570 F2d 724 (8th Cir), *cert denied*, 436 US 957 (1978).

The rate analysis for an auction stockyard begins with an examination of the stockyard's cost of operation for the base year, which is the most recent year for which statistics are available. [634] Most of the market's *expenses* are presumed to be reasonable and necessary for the efficient operation of the stockyard.[635] However,

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634 37 Agric Dec at 575.

635 Id 575-76.

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four categories of expenses are replaced by allowances which may be more or less than the actual expenses of the market.

The expenses replaced by allowances are: (1) the compensation paid by a market to an owner for personal work and management, (2) interest paid by the stockyard, (3) bad debts, and (4) business getting and maintaining expenses, including losses sustained by the market in market support activities. (Footnote omitted.) In addition, the Packers and Stockyards agency adds allowances for: (1) return on buildings and equipment, (2) use of land, and (3) operating margin. The sum of the reasonable expenses and allowances is the markets "total reasonable revenue requirement," which is the amount that the market's future rates should produce. (Footnote omitted.)

The allowance for return on buildings and equipment is computed on the basis of the appropriate rate of return multiplied by the original cost, when first dedicated to the public use, of the buildings (including improvements) and equipment, less depreciation. (Footnote omitted.)

The allowance for land ignores the value of the land and is computed instead on the basis of the number of animal units sold by the stockyard during the base year. (Footnote omitted.)

The reviewing courts held in the *Central Arkansas Auction Sale* rate case [640] and the *Giles Lowery Stockyards* rate case [641] that a

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640 Central Ark Auction Sale, Inc v Bergland, 570 F2d 724, 729 (8th Cir), *cert denied*, 436 US 957 (1978).

641 Giles Lowery Stockyards, Inc v Dept of Agric, 565 F2d 321, 324 (5th Cir 1977), *cert denied*, 436 US 957 (1978).

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reasonable rate is one that is not confiscatory in the constitutional sense. However, the judicial officer stated in both cases that with respect to auction stockyards, the due process clause of the Fifth Amendment to the Constitution does not require that every auction

market owner be permitted to earn a reasonable return on the market's rate base, regardless of whether the market handles an adequate volume of livestock. [642] Nonetheless, the judicial officer

642 *In re* Central Ark Auction Sale, Inc, 37 Agric Dec 570, 615-22 (1977), *affd*, 570 F2d 724 (8th Cir), *cert denied*, 436 US 957 (1978); *In re* Giles Lowery Stockyards, Inc, 35 Agric Dec 267, 282-89 (1976), *affd*, 565 F2d 321 (5th Cir 1977), *cert denied*, 436 US 957 (1978); and *see* §*3.73*, notes 628 and 629, and related text.

would not implement a rate policy that would drive the small inefficient auctions out of business unless the administrative officials of the Packers and Stockyards agency recommended such a policy. [643]

643 *In re* Central Ark Auction Sale, Inc, 37 Agric Dec 570, 622 (1977), *affd*, 570 F2d 724 (8th Cir), *cert denied*, 436 US 957 (1978).

IV. Complainant's Appeal Petition Correctly Interprets the Law of Agency, As Applied to the Facts Herein, and Complainant's Arguments Fall Within the Mandates of Pertinent Controlling Decisions, and the Legislative History of the Act, Including the 1978 Rates-Amendment History.

Complainant's arguments on appeal correctly interpret the law of agency (see § I, *supra*) and properly apply it to the facts herein. Complainant's arguments fall well within the mandates of controlling decisions (see § II, *supra*). Moreover, the legislative history of the Act, as amended in 1978 (see § III, *supra*), is clear that the Secretary retains the authority to reject Tariff No. 2 as unjust, unreasonable and discriminatory.

Complainant's arguments on appeal will be numbered and stated in subsection A and examined in subsection B, *seriatim*.

A. Complainant's Arguments on Appeal.

Complainant argues on appeal (Complainant's Appeal Petition and Brief in Support Thereof (Mar. 2, 1987) (hereafter "CAP")) that: (1) respondent is registered as a commission-basis seller of livestock, and functioned as such (CAP at 3); respondent could have legally chosen either to be a purchase-and-resell dealer in its own account, or to have become an "order-buyer" agent for its buyers on commission, but did not (CAP at 3); instead, respondent chose to hold itself out to consignors as a commission-basis agent (CAP at 3); respondent, as agent, owes a fiduciary duty to consignors to obtain the highest possible price for consigned slaughter livestock (CAP at 3); (2) respondent's, and similar auction-market owners', testimony that receiving fees from buyers would not impair their fiduciary duty to consignors is naive and unrealistic (CAP at 3); (3) it was error for the ALJ to treat the fee/commission charged to buyers merely as an "add-on to the purchase price"; P&SA witness Davis' testimony is convincingly clear that a fee or commission charged to the buyer necessarily affects the ability of the market owner to fulfill his fiduciary duty free of conflicts of interest (CAP at 3-4); (4) e.g., a market on commission from the seller has the incentive to create the most competitive market possible to get the highest price possible, upon which the market's commission is based, but, where the fee is assessed the buyer, the incentive is to seek not buyers, but cattle, to be sold at a price high enough to induce consignments,

it not so high as to discourage potential buyers (CAP at 4); the market perator, then, would no longer be interested in getting the highest possible ice per animal but rather simply a high enough price to induce the nsignment but not so high that the potential buyer will not take the livestock CAP at 4); (5) the ALJ incorrectly minimizes the impact that a buyer's fee ould have on prices bid (CAP at 4); (6) a local packer, Mr. Fairbank, stified unequivocally that he would bid less per pound if he had to pay a buyer's fee (CAP at 4); the ALJ found (Finding 9) that a buyer's fee would tend to decrease prices, but if a buyer's fee increased buyer attendance, higher prices may nonetheless result (CAP at 4); however, complainant submits that such a fee will likely deter buyers, sending buyers elsewhere, which could lessen competition and lower prices (CAP at 5); (7) market-owner witness Chambers' testimony, relied on by the ALJ (Initial Decision at 10), that farmers care more about deductions taken from their sales proceeds than bottom-line proceeds, is unbelievable and inconsistent with his other testimony that he could not institute such a buyer's fee at his market because his prices are reported in USDA Market News Reports (complainant correctly infers that he meant that his prices would be lower and compare unfavorably with other reported markets) (respondent's prices are not so reported) (CAP at 5); (8) another basis for complainant's objection to the tariff as unreasonable is misconstrued by the ALJ, in that the objection is not (as the ALJ apparently believes) that the buyer's fee makes it inconvenient for complainant to compare prices, but that it makes it impossible for the farmer to compare prices (CAP at 5); the reason for complainant's objection is not that Tariff No. 2 lacks the uniformity to ease the Department's regulatory burden, but rather that this pricing scheme activates the Department's duty both to assist the farmer in making knowledgeable choices, and to ensure that marketing agents avoid conflicts of interest (CAP at 5-6); the consignor cannot make a meaningful choice if one market assesses a buyer's fee, causing lower bid prices, while another market receives higher bid prices but assesses the consignor a fee (CAP at 6); (9) this case involves more than whether respondent was deceptive in implementing the change; and (10) this case goes to the very definition of a market agency selling on commission; it is unreasonable for a market agency to charge the *buyer* for services rendered to the *seller*; it is discriminatory for respondent to charge consignors of replacement dairy cows for services essentially identical to those given to consignors of slaughter cattle, where no fee is charged to the seller; the market agency does not properly represent the consignor when the buyer's fee deters buyers, and makes it likely that the bid price will be lower, thereby interfering with the market agency's duty to obtain the highest possible price; and where the seller's fee is paid by buyers, the market agency's incentive becomes to gather as many animals as the buyer will take and still pay the fee, rather than obtain the highest possible price for each animal (CAP at 6).

B. Complainant's Arguments on Appeal Analyzed.

Complainant is correct (1) that respondent chose to hold itself out as a commission-basis seller of livestock, when it could have chosen in these circumstances, under these same marketing facts, to be either a purchase-and-resell dealer in its own account, or an order-buyer on commission from the buyer. Consequently, as a commission-basis agent, it ineluctably owes its

consignors a fiduciary duty to obtain the highest possible price for consigned slaughter livestock (see § I, *supra*).

Complainant's argument (2) is correct that respondent's and similar auction-market owners' testimony that such a pricing scheme (of receiving buyer's fees) would not impair their fiduciary duty is naive and unrealistic. Moreover, as pointed out in the law of agency section (§ I, *supra*), the auctioneer's fiduciary duty occurs as a matter of law, and cannot be affected by intentions, good or bad. To the extent that the law of agency concerning auctioneers and their fiduciary duties to consignors can be changed by agreement (§ I, *supra, Agency 2d*, § 39), we have no express agreements here. And, even if agreements were to be constructively implied from the testimony of farmer/witnesses such as Mr. Larry Rater--that farmers approve of this pricing scheme (Tr. 134-35)--the Department has the power and the duty to reject such tariffs under the primary objectives of the Act. This is set forth in *Spencer* where the Ninth Circuit holds unlawful trade practices based on unfair prices paid "regardless of whether consignors were satisfied with what they got" (see § II, *supra; Spencer*, No. 87-7189, slip op. at 2849).

I agree with complainant's argument (3) that the ALJ's decision to treat the buyer's fee merely as an "add-on to the purchase price" was error, and this charge is more properly viewed as an "inducement for sale," best described as an improper "bonus" within § 424 of *Agency 2d* (see § I, *supra, Agency 2d*, § 424 Comments g and h). Whatever it is called, the buyer's fee impermissibly interferes with the fiduciary duty owed the consignor, because it introduces a competing interest, impairing the loyalty of the agent to his principal (the consignor). (See § I, *supra*, citing *Agency 2d* at § 39 Comment a, and § 424 Comments g and h).

Complainant's argument (4) is correct that a commission market operator is normally interested in the most competition to get the highest bid prices; but, with a buyer's fee it would naturally seek cattle, not buyers, which cattle would be sold high enough to induce consignments, without discouraging potential buyers. The market agency would no longer be interested in getting the highest possible price per animal. Consequently, complainant's argument (5) is correct that the ALJ erred in minimizing the impact a buyer's fee would have on prices bid. However, even if there were evidence that the pricing scheme did not happen to operate as complainant has forecast (and as respondent attempts to argue in the next section), it would still be found unjust, unreasonable and discriminatory whether or not it harms consumers or competitors (see § II, *supra, Spencer*, No. 87-7189, slip op. at 2849).

Complainant's argument (6) revolving around (packer/buyer) Mr. Fairbank's testimony, and attacking the ALJ's Finding 9, is correct. This packer witness testified that with a buyer's fee he would bid less per pound, and the ALJ found as much (Finding 9). The ALJ then concluded in the Initial Decision that *if* a buyer's fee had the opposite effect (attracting buyers), higher prices may nonetheless result. The ALJ's conclusion (higher prices under a buyer's fee) is really only based upon some witnesses' firmly held beliefs, which are contrary to the beliefs of Mr. Harold W. Davis, Director, Livestock Marketing Division, P&SA. Mr. Davis testified that the buyers' fee would be an impediment to the market's ability to solicit new buyers, and would tend to lower prices at the market (Tr. 49-53, 65-66, 85-86). I find Mr. Davis' testimony, representing the views of P&SA, which has administered this law since 1921, to be persuasive. Lower prices would, of course, contravene one of the principal purposes of the Act--that farmers and ranchers not receive less than the true market value of their livestock--which cannot be permitted by the Department (see § II, *supra, quoting Spencer,*

supra, at 198-200, which quotes the legislative history of the 1958 amendments to the Act).

Complainant's argument (7) concerning witness Chambers' testimony (Tr. 108-11) is correct in that his testimony is unbelievable that farmers are more concerned with deductions than bottom-line proceeds. The most telling point Mr. Chambers testified to was that he would not institute a buyer's fee at his auction market because (as complainant correctly construes) his prices would compare unfavorably with other markets in the USDA Market News Reports (Tr. 110) (respondent's market is not covered by USDA market reports (Tr. 118)). Mr. Chambers' own pricing determination (i.e., not to institute a buyer's fee at his market because of the unfavorable price comparison that would result in USDA Market News Reports) is based on the position, which I accept, that farmers are more influenced by their bottom-line proceeds than they are by deductions.[7]

If there were any truth to the statement that farmers tend to want to receive less than the full value of their livestock, as long as there is no "deduction" from their proceeds, it would be the Department's duty to prevent such self-destructive behavior (if it did exist) at an auction market that had an unjust, unreasonable or discriminatory tariff, "regardless of whether consignors were satisfied with what they got" (see § II, *supra; Spencer*, No. 87-7189, slip op. at 2849).

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[7]The desire of farmers to obtain the *highest* price per cwt., even if the price per cwt. is deceptive, is explained in *In re Saylor*, 44 Agric. Dec. 2238, 2463-64 (1985) (decision on remand), as follows:

> In studying pencil shrink and other weighing practices and conditions, I had many discussions with farmers, ranchers, dealers, order buyers, commission sellers, stockyard operators and packers throughout the country. As a result of that study, I concluded that pencil shrink is a deceptive practice that should be prohibited. As stated in Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law* 231 (1981):
>
> > When livestock is sold in direct or country transactions, it is frequently sold with a pencil-shrink, e.g., 4 per cent, which is to approximate the amount of shrinkage the livestock will incur in its movement to the packing plant or other destination. This is deceptive since with a 4 per cent shrink the price is actually based on 15-1/3 ounces rather than on 16 ounces. Although the livestock may well shrink 4 per cent after purchase, livestock purchased at a public market similarly shrinks after purchase, but such shrinkage is taken into account at a public market by the price paid per pound rather than by reducing the weight.
> >
> > Some sellers do not recognize that 4 per cent off the weight is the same as 4 per cent off the price. Thus selling with pencil-shrink gives sellers the impression that they are receiving an inflated price per pound for their livestock. Although deceptive, this custom is so ingrained in the livestock industry that it will probably continue. 259/
>
> 259 When the author was administrator of the Packers and Stockyards Administration, he attempted to gain producer support for a regulation to prohibit pencil-shrink, but the producers strongly favored the system. Since they can quote a higher selling price for their livestock to their friends and neighbors, they like this deception. . . .

Complainant's argument (8) is also correct that the ALJ misconstrues complainant's objection to Tariff No. 2 as being inconvenient to the P&SA's effort to compare prices, rather than the proper thrust of the objection, which is that the pricing scheme makes it difficult for farmers to compare prices. The ALJ's misconstruction is evident from the "administrative inconvenience" language and the citing of the *Dobbs and Goldberg* cases at the very end of the Discussion section in the Initial Decision. These cases stand, *inter alia*, for the proposition that administrative inconvenience and burden cannot extinguish legal rights, at least, in the federal environmental-construction grant, and welfare entitlements programs, respectively. We have no such problems here, as the Department does not complain that it cannot discern prices, but, rather, that farmers cannot. The objection is that the pricing scheme denies farmers the ability to make meaningful price comparisons, which, in turn, activates the Department's duty both to assist the farmer in having meaningful prices, and to prevent the sort of conflicts of interest inherent in the subject Tariff No. 2.

Complainant's argument (9) is correct that this case involves more than respondent's deception implementing the change (Finding 11). Regardless of the underlying merits of respondent's Tariff No. 2, the advertising used to solicit consignors did not serve to reveal the $10 fee to buyers. Unsuspecting farmers were led by flyers and newspaper ads to believe that sales of slaughter cattle would be handled by respondent *totally free* of commission charges (Tr. 44). Shifting auction market charges to buyers, *unannounced*, in this fashion, was clearly deceptive, and thus unreasonable. Compounding the deception in the advertising was the omission of the simultaneous increase in charges on replacement dairy animals (Tr. 46). Moreover, respondent's flyers (CX 11) included with proceeds checks sent to consignors did not reveal the buyer's fee (Tr. 21). Thus, the ALJ was correct to find the *implementation* of the tariff in violation of the Act.

However, it was error for the ALJ to conclude that Tariff No. 2 would be acceptable for filing if certain drafting, posting, and advertising notifications were made in and regarding the tariff. Tariff No. 2 is fundamentally unjust, unreasonable and discriminatory for all the reasons stated heretofore in this decision, *supra*, and cannot be made proper by a clearer description of its improper terms, even if consignors and buyers are fully apprised in advance. Because I deem Tariff No. 2 unsalvageable by such new or enhanced disclosure terms, there is no more discussion necessary on this point.

Complainant's final argument (10) correctly argues that the very definition of a market agency selling on commission is at issue here,[8] because such a market may not charge the buyer for services rendered to the seller, and may not discriminate by charging one consignor (of replacement dairy cows) and not charging another consignor (of slaughter livestock) for essentially identical services. There is no point in restating complainant's supporting arguments on this, which have largely been thoroughly advanced and discussed in this section, analyzing complainant's arguments 1-9 above.

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[8]"The term 'market agency' means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis . . ." (7 U.S.C. § 201(c)). Congress was obviously referring to a commission paid by the principal to his agent, e.g., by a consignor to an auction market operator. Hence if an auction market operator is not selling "on a commission basis" for his consignor, the auction market operator is not a "market agency" in the transaction, and cannot hold himself out as a market agency, or file a tariff as a market agency selling on commission. (Market agencies buying on a commission basis (e.g., for packers) are not required to file tariffs.)

V. Respondent's Answer to Complainant's Appeal Petition Incorrectly Interprets the Law of Agency, As Applied to the Facts Herein, and Respondent's Arguments Are Contrary to the Mandates of the Pertinent Controlling Decisions, and the Legislative History of the Act, Including the 1978 Rates-Amendment History.

Respondent's answer petition incorrectly interprets the law of agency (see § I, *supra*), as applied to the facts herein. Respondent's arguments do not square with the mandates of controlling decisions (see § II, *supra*). Moreover, the legislative history of the Act, as amended in 1978 (see § III, *supra*), is clear that the Secretary retains the authority to reject Tariff No. 2 as unjust, unreasonable, and discriminatory.

Respondent's arguments on appeal will be separately stated and numbered in subsection A, and analyzed in subsection B, *seriatim*, below.

A. Respondent's Arguments on Appeal.

Respondent argues in response to complainant's appeal (Respondent's Answer Petition and Brief in Support Thereof) (Mar. 31, 1987) (hereafter "RAP") that: (1) although Mr. Harold Davis of P&SA testified that the agency's primary concern is that it is unreasonable to charge the buyer for services rendered to the seller, no case law or statutes were cited to support unreasonableness (RAP at 3); (2) although Mr. Davis also testified that this practice *might* lessen fiduciary responsibility owed the seller by the market agency, Mr. Chambers, a market owner, testified that this would not occur because buyers are "bad" and "tough," and market owners would not "befriend" buyers (RAP at 3-4); (3) a consignor/farmer of respondent, witness Mr. Larry Rater, does not believe that this pricing scheme would breach the market's fiduciary duty to him, but, rather, testified it would strengthen the market by bringing more cattle, which, in turn, would bring more buyers and increase competition, thereby benefiting him and other farmers; (4) contrary to complainant's assertion that market owners will not admit to being influenced by the person (buyer) paying the money, none of the market owners testified that they would definitely install a similar pricing program; however, auction market owners Chambers and Dybka testified, respectively, that they would not install this "innovation" now, because Mr. Chambers' prices are published in USDA's Livestock Marketing Report, and Mr. Dybka will wait to see if he loses business to respondent; this testimony emphasizes "that the market itself will determine whether this tariff" will perpetuate itself (RAP at 4-5); (5) Mr. Fairbank, an area packer, testified that he did not oppose a buyer's fee but he would bid less per pound because of the buyer's fee, but would not rule out bidding more if competitive bidding drove prices higher than he wished to bid (RAP at 5); (6) although complainant claims that no increased buyer participation occurred under Tariff No. 2 [in effect only between September 30 and October 14, 1986 (Tr. 18)], complainant's first witness testified to a slight increase in volume (witness D'Agostino at Tr. 30); whether consignors (new) increased during this period, or regular consignors contributed more cattle, the effect was increased prices paid per pound (Tr. 118); contrary to complainant's expectations, buyers did not stay away because of the buyer's fee, and volume and prices per pound increased, with no loss of usual customers (Tr. 117) (RAP at 6); (7) unhappy sellers may do business elsewhere (RAP at 6); (8) contrary to Mr. Davis' speculative testimony that

shifting sellers' charges to buyers is unreasonable, because of the lessening of the fiduciary duty owed by the market agency to the seller, the shifting of the fee to buyers has enhanced that duty because of the increased market volume and higher prices paid, such that complainant's assertion that the ALJ minimized the impact the buyer's fee would have on the price bid is not correct (RAP at 6-7); (9) contrary to complainant's assertion and fear that a buyer's fee makes it impossible to compare prices, farmer Larry Rater testified (Tr. 136-37) that he compares daily prices either by reading newspapers or by telephoning individual markets, which is a more important indication of the situation than the "fears" of P&SA; (10) contrary to P&SA's mistaken belief that a buyer's fee will lessen fiduciary duty, because services provided the seller are charged to the buyer (Tr. 53), it is a long-time, acceptable practice in New York, and an auctioneer's fiduciary duty has not been held to require that his fees be paid directly and exclusively by the consignor (*Bleecker v. Franklin*, 2 E.D. Smith 93 (NY 1853); *Muller v. Maxwell*, 2 Bosw. 355 (NY 1857) (RAP at 7-8)); and (11) It is "entirely permissible" for respondent to institute a tariff, similar to one already agency-approved (RX 1), which approved tariff works to shift a share of the burden of paying a fee from the seller to the buyer; and a decision by the Interstate Commerce Commission on the reasonableness of a rate has been held to be conclusively available to all shippers similarly situated even though they were not before the Commission in the original proceeding (*Aron v. Pennsylvania R.R.*, 80 F.2d 100 (2d Cir. 1935), 103 A.L.R. 1367, *cert. denied*, 298 U.S. 658 (1935) (RAP at 8-9).

B. Respondent's Arguments on Appeal Analyzed.

Respondent's argument (1) that neither case law nor statutes are cited to support P&SA witness Davis' testimony (that the agency's primary concern is that it is unreasonable to charge the buyer for services rendered to the seller) is not persuasive.

On at least three occasions, witness Davis testified under cross-examination by respondent's counsel, Mr. DiCerbo, that the Act--a statute--and the general law of agency supported unreasonableness. Mr. Davis testified (Tr. 61-62, 74, 84-85):

> By Mr. DiCerbo:
>
> Q. Again, your major concern is what?
>
> A. That they're assessing a fee to the buyer for services rendered to the seller.
>
> Q. You are basing that upon a common law belief, that the buyer cannot --
>
> A. No. I'm basing that under the belief that under the Packers and Stockyards Act they have a legal and fiduciary responsibility created out of their acting for the seller and that the services rendered there are to the seller.
>
> Q. You are saying that somewhere in the act --
>
> A. No. I'm saying that the act places that fiduciary responsibility on the market.

. . . .

Q. Oh. Gee. It would seem to me that you said that because he's doing all these things he's doing them for the seller and not for the buyer?

A. Yes.

Q. But you are saying the compensation has nothing to do with fiduciary responsibility?

A. No, that's not what I'm saying. You asked if I was placing all of it. And the answer to the question is no.

Q. The majority of it?

A. That is a factor. The fiduciary responsibility is there because I believe general law of agency would place it and because the Packers and Stockyards Act specifically places a fiduciary responsibility there.

. . . .

Q. Okay. And you are saying somewhere in your thinking that it's wrong for a buyer to pay an auctioneer?

A. I'm saying -- I believe it's turning around what I'm saying. I'm saying it's wrong for the buyer to charge the --

Q. You are saying it's wrong for the buyer for services done to the seller?

A. Yes.

Q. Okay. You are basing that on a regulation?

A. No.

Q. You are basing that on common law?

A. Basing that on the fact that the rate --

Q. I didn't ask you that.

A. No.

Q. Are you basing it on common law?

A. No.

Q. All right. Now I'll give you your chance. What are you basing it on?

A. The principles in the act which says that any unreasonable -- that the charges must be reasonable, justice [sic] and nondiscriminatory and our belief that it's unreasonable to charge the buyer.

Q. Based upon no case law, based upon a prior tariff, that in fact you had no complaint you are making that determination?

A. Yes.

Thus, P&SA witness Davis testified properly as to the statutory basis for the agency's actions, and even cited the general law of agency. The discussion of the law of agency in § I, *supra*, and the pertinent P&SA cases, in § II, *supra*, totally support Mr. Davis' position.

Moreover, in § III, *supra*, it is shown clearly by the legislative history of the 1978 Amendment to the Act that the Secretary retains "broad discretion" to determine unreasonableness of rates "since the only statutory standard is that rates be just, reasonable, and nondiscriminatory" (see § III, *supra*, *citing Campbell*, 1 Davidson, Agricultural Law § 3.71, at n. 593).

Obviously, it is not necessary that a P&SA witness in this context be able to cite case law under the Act from the witness stand. In any event, the agency's position is supported (by way of analogy) by *In re Daniels*, 14 Agric. Dec. 903, 918-19, 921 (1955), *aff'd*, 242 F.2d 39 (1957), *cert. denied*, 354 U.S. 939 (1957), where Judicial Officer Flavin found respondent's improper charges, and failure to render and maintain just, fair and nondiscriminatory stockyard services and practices, a violation of sections 304, 305, 307 and 312(a) of the Act (7 U.S.C. § § 205, 206, 208 and 213(a)), stating:

> The assessment of improper feed and shed pen charges by respondent constitutes an unfair, unjustly discriminatory and deceptive practice in violation of section 312(a) of the act (7 U.S.C. 213(a)) and a failure to render and maintain just, fair and nondiscriminatory stockyard services and practices in violation of sections 304 and 307 of the act (7 U.S.C. 205 and 208). *In re Hensley-Andrews Commission Company*, 14 A.D. 212 (1955); *In re Wootten-Faddis-Dillinger Commission Company*, 13 A.D. 1146 (1954); *In re J. F. Sadler & Company*, 4 A.D. 977 (1945). The assessment of improper charges also constitutes a violation of section 305 of the act (7 U.S.C. 206). *In re Robert H. Drake and Harley R. Drake*, 9 A.D. 466 (1950). . . .
>
> Complainant contends and respondent denies that respondent failed to furnish reasonable selling services at the stockyard in connection with cattle consigned to him for sale on a commission basis. . . .
>
> . . . .

> From all the evidence adduced at the hearing, it is concluded that respondent's selling services in connection with consigned cattle during an extended period of time, May 1954 through January 1955, were not equal to the standard of performance which his consignors are entitled to expect and that such selling practice constitutes a wilful violation of sections 304, 307 and 312(a) of the act (7 U.S.C. 205, 208 and 213(a)).

Upon review in the Seventh Circuit, the court affirmed, noting that, *inter alia*, (*Daniels, supra*, at 41):

> The Judicial Officer found that from November 1, 1953 to August 31, 1954, respondent assessed and collected unfair and unreasonable feed and shed pen charges from shippers whose livestock he sold on a commission basis by deducting from the proceeds received by him amounts for feed charges where such feed was not supplied, and for feed charges greater than were actually supplied. . . . The Judicial Officer also found that favored treatment "with respect to feed and shed pen charges was accorded to consignments of cattle which respondent owned or in which he had a financial interest." . . .
>
> The Judicial Officer also found that during the period May, 1954 through January, 1955, respondent "failed to furnish reasonable selling services at the stockyard in connection with cattle consigned to him for sale on a commission basis, * * *." However, the suspension of respondent's registration was based upon the improper shippers' proceeds transactions and on improper feed and shed pen charges.

The *Daniels* decision demonstrates the Department's long-standing determination that selling services must achieve a proper standard of performance for consignors, or be found unreasonable. Given the broad discretion placed in the Secretary to determine reasonableness of rates under the Act, *Daniels* supports the Department's finding herein that charging *buyers* for services provided to sellers is unreasonable, violates the Act, and must be rejected.[9]

Respondent's argument (2) is without merit. Mr. Davis' testimony that respondent's fiduciary duty to sellers would be lessened by Tariff No. 2 cannot be successfully controverted by the avowed good intentions of market owners like witness Chambers (see discussion of this same argument in § IV(B)(2), *supra*). Such intentions and belief are naive and unrealistic. Moreover, agency law mandates the fiduciary duty between auctioneer and seller. While the relationship can be changed by agreement, there are no express or implied agreements in the record. And, even if there were, the Department would by duty reject an agreement to permit a tariff not authorized by the Act (see § II, *supra, Spencer*, No. 87-7189, slip op. at 2849).

Respondent's argument (3), based upon witness Rater's testimony, is without merit, for the same reasons set forth in § IV(B)(2), *supra*. Even if

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[9]Conversely, it is an unfair and deceptive practice for buyers (packers and dealers) to collect from *sellers* any compensation in the form of commission, yardage, or other service charge. 9 C.F.R. § 201.98; *Ilyatt v. United States*, 276 F.2d 308, 311-13 (10th Cir. 1960); *In re Jackson Union Stockyards, Inc.*, 37 Agric. Dec. 1533, 1538-40 (1978), *aff'd mem.*, 597 F.2d 770 (5th Cir. 1979).

farmers approve of this pricing scheme (Tr. 134-35), the Department has the power and the duty to reject such tariffs under the primary objectives of the Act. This is demonstrated (by way of analogy) in *Spencer*, where the court rejects unfair trade practices based on unfair prices paid "regardless of whether consignors were satisfied with what they got" (see § II, *supra*; *Spencer*, No. 87-7189, slip op. at 2849).

Respondent's argument (4) disputes complainant's claim that market owners are simply not going to admit that they would be influenced by the person who pays the money. However, as stated above, I agree with complainant (see § IV(B)(2)). Furthermore, as stated in § IV(B)(7), *supra*, Mr. Chambers' testimony that he would not institute a pricing scheme similar to that of respondent at this time because Mr. Chambers' prices are reported in the USDA Market News Reports emphasizes complainant's point that respondent's tariff will result in lower prices to consignors.

Respondent's (implicit) argument that the validity of respondent's tariff should be determined by its success or failure in keeping respondent's consignors happy ignores the fact that farmers cannot make appropriate price comparisons where one or more markets charge buyers a fee and others charge sellers a fee (see § IV(B)(8), *supra*), and ignores the Department's duty to reject unjust, unreasonable and discriminatory tariffs, irrespective of whether consignors are happy (see § IV(B)(7), *supra*).

Respondent's argument (5) is without merit. Witness Fairbank's testimony is contradictory.[10] He testified flatly that he would bid less per pound, if he paid a buyer's fee (Tr. 142). If other buyers bid up the price, he would maybe pay more. However, as discussed in § IV(B)(6), *supra*:

> This packer witness testified that with a buyer's fee he would bid less per pound, and the ALJ found as much (Finding 9). The ALJ then concluded in the Initial Decision that *if* a buyer's fee had the opposite effect (attracting buyers), higher prices may nonetheless result. The ALJ's conclusion (higher prices under a buyer's fee) is really only based upon some witnesses' firmly held beliefs, which are contrary to the beliefs of Mr. Harold W. Davis, Director, Livestock Marketing Division, P&SA. Mr. Davis testified that the buyers' fee would be an impediment to the market's ability to solicit new buyers, and would tend to lower prices at the market (Tr. 49-53, 65-66, 85-86). I find Mr. Davis' testimony, representing the views of P&SA, which has administered this law since 1921, to be persuasive. Lower prices would, of course, contravene one of the principal purposes of the Act--that *farmers and ranchers not receive less than the true market value of their livestock*--which cannot be permitted by the Department (see § II, *supra*, *quoting Spencer, supra*, at 198-200, which quotes the legislative history of the 1958 amendments to the Act).

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[10]The validity of the $10 transportation fee paid by Fairbank to farmers who deliver laughter livestock to his packing plant is not involved here. Theoretically, at least, a packer's ransportation fee could be an "unfair, unjustly discriminatory, or deceptive practice or device" U.S.C. § 192(a)).

Respondent's argument (6) is without merit when it argues that the testimony reveals, *inter alia*, that while the tariff was in effect there were more consignors, more cattle, increased volume and increased prices paid per pound, with no loss of the usual buyers. This argument implies that these results were the "cause and effect" of Tariff No. 2. No such inferences may properly be drawn from the anecdotal 2-week period when Tariff No. 2 was in effect. There were only four sale days during this period (Tr. 116).

But, such inferences, even if supportable, would not salvage Tariff No. 2, because the pricing scheme is unjust, unreasonable and discriminatory.

Respondent's argument (7) is without merit, where it proposes to send unhappy sellers elsewhere. This line of reasoning--farmers should protect themselves--was specifically rejected by the *Spencer* court decision (in a different context), as follows (No. 87-7189, slip op. at 2849) (emphasis added):

> Petitioners further characterize the feeders' belief that they were operating on commission as a "misconception," and assert that in the absence of proof of an anti-competitive effect, the Department should leave feeders to protect themselves against such "misconceptions" by insisting on written contracts.
>
> This argument relies on an incomplete understanding of the objectives of the Act. The primary purpose of the Act was "to assure fair competition and fair trade practices in livestock marketing. . . ." H.R. Rep. No. 1048, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 5212, 5213 (emphasis added). It was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics. Thus, under the *Central Coast* rule, we uphold a finding of a § 213 violation where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors.

Respondent's argument (7) continued) also ignores here the very testimony of auction market owners Dybka and Chambers, upon which respondent relies in another context, that their markets might institute such a pricing scheme if respondent is successful with Tariff No. 2. Query where respondent would have unhappy sellers go, who prefer selling at auction, if all area auction markets institute buyer's fees?

Respondent's argument (8) is incorrect in all its premises and conclusions. Mr. Davis' testimony on unreasonableness is not speculative, but is clearly based upon the law of agency (see § I, *supra*), and the Act (see § § II and IV(B)(1), (2) and (4)). A market agency may not "lessen" its fiduciary duty to the seller by accepting a buyer's fee or "bonus" from buyers. "Lessen" is not the proper term here; rather, the term "violate" describes the agent's activity.

Moreover, respondent's term "enhance" is not appropriate to modify a fiduciary duty owed sellers. In any event, no dispositive evidence is in the record to show that Tariff No. 2 increased market volume or that the tariff caused higher prices. Consequently, no "enhancement" (as respondent calls

it) occurred, insofar as this record shows. But, even if there were such dispositive evidence of "enhancement," Tariff No. 2 would still be rejected, because the buyer's fee is a "bonus" or "inducement for sale" impermissibly interfering with the fiduciary duty owed the consignor (see § I, *supra, Agency 2d*, § 39 Comment a, and § 424 Comments g and h; and § IV(B)(3)). Also, the buyer's fee is objectionable "regardless of whether consignors were satisfied with what they got" (see § IV(B)(2), *supra, quoting, Spencer*, No. 87-7189, slip op. at 2849).

Finally, respondent argues ((8) (continued) that complainant's assertion is wrong that the ALJ incorrectly minimized the impact of a buyer's fee on prices. However, in § IV(B)(4) and (5), *supra*, I found the opposite to be true, as follows:

> Complainant's argument (4) is correct that a commission market operator is normally interested in the most competition to get the highest bid prices; but, with a buyer's fee it would naturally seek cattle, not buyers, which cattle would be sold high enough to induce consignments, without discouraging potential buyers. The market agency would no longer be interested in getting the highest possible price per animal. Consequently, complainant's argument (5) is correct that the ALJ erred in minimizing the impact a buyer's fee would have on prices bid. However, even if there were evidence that the pricing scheme did not happen to operate as complainant has forecast (and as respondent attempts to argue in the next section), it would still be found unjust, unreasonable and discriminatory whether or not it harms consumers or competitors (see § II, *supra, Spencer*, No. 87-7189, slip op. at 2849).

Respondent's argument (9) is that farmers can compare prices just like witness Larry Rater does (Tr. 137), by phone calls and newspapers. Thus, respondent reasons that complainant's fears, that buyer's fees render impossible the comparison of prices, are misplaced. However, I agree with complainant's position.

Not all market's prices are reported. For example, respondent's prices are not in USDA's Market News Reports (Tr. 118). Even if phone calls are made by a consignor to markets not reported, not all market agencies will institute a buyer's fee. (Auction owner Dybka may or may not have a buyer's fee, depending on the success of Tariff No. 2 (Tr. 40)). Hence some, but not all, of the prices which could be gleanable from newspapers or phone calls would be subject to unjust, unfair and discriminatory inducements and bonuses (which are the very subject of this proceeding), allowing no realistic comparison. It would be like comparing "apples and oranges."

Finally, the main issue is not about availability of prices. The main issue is not whether prices are readily available, through no effort, some effort, or great effort on the part of the farmer (although that is of interest to P&SA). The main issue is whether respondent's tariff is unjust and unreasonable because it charges the buyer for services rendered to the seller, and it interferes with the fiduciary relation between the market agency and the consignor, and is discriminatory, in that it charges consignors of dairy

replacement cattle for services provided free for consignors of slaughter livestock.

Moreover, it does not matter that farmers have not yet been shown to have suffered losses under Tariff No. 2. The Department's responsibility is clear, because the Act does not require that complainant allege and prove precisely who was injured by an unlawful practice, or that an injury has in fact already occurred. This was recently restated in *In re White*, 47 Agric. Dec. ____, slip op. at 72-73 (Jan. 11, 1988), *appeal docketed*, No. 88-3144 (6th Cir. Feb. 22, 1988), as follows:

> Many cases hold that it is not essential under the Act for complainant to allege and prove precisely who was injured by an unlawful practice. For example, as stated in *In re Hines*, 35 Agric. Dec. 113, 124 (1976) (emphasis added):
>
> > With respect to that matter, Judge Baker [ALJ] stated (Initial Decision, pp. 12-13):
> >
> > The Respondent emphasizes that a practice, in order to be a violation of the Act, cannot be a practice which possibly in some circumstances could result in unfairness - - it must be unfair. In this regard, the Respondent cites *Capitol Packing Co. v. United States*, 350 F.2d 67 (10th Cir. 1965), where the court stated among other things that there is no penalty for "almost" violating the Act, and the diversity of ways and frequency with which one "almost" violates the Act do not constitute a violation. "In order for a violation of § 312(a) to be committed, a specified manner of dealing must be found to be unfair or deceptive."
> >
> > In the subject case the Complainant by its own admission has admitted that the acts of the Respondent herein were not *per se* unfair and that, in essence, what he was being charged with was the *possibility* of unfairness.
> >
> > The respondent's argument in this respect is completely without merit. The Packers and Stockyards Act is designed to "prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required." *Bowman v. United States Department of Agriculture*, 363 F.2d 81, 85 (C.A. 5), quoting from *Daniels v. United States*, 242 F.2d 39, 41-42 (C.A. 7), certiorari denied, 354 U.S. 939. Both cases involve the Packers and Stockyards Act. See, also, *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 152; *Fashion Guild v. Federal Trade Commission*, 312 U.S. 457, 466.

This interpretation of the Act extends to *any* practice, and it has been consistently Departmental policy under section 312(a) of the Act (7 U.S.C. § 213(a)) that it is not necessary to prove particular injury,

because it is the Department's duty to stop unlawful practices in their incipiency, prior to actual injury. As more recently stated in *In re Corn State Meat Co., Inc.*, 45 Agric. Dec. 995, 1023 (1986) (emphasis added):

> The Department has consistently taken the position that in order to prove that any practice is "unfair" under § § 202(a) (7 U.S.C. § 192(a)) or 312(a) (7 U.S.C. § 213(a)) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury. [15]

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[15] *E.g., In re ITT Continental Baking Co.*, 44 Agric. Dec. [748, 781 (1985), *final order*, 44 Agric. Dec. 1971 (1985)] (consent cease and desist order and $10,000 civil penalty); *In re Walti, Schilling & Co.*, 39 Agric. Dec. 119, 149-50 (1978); *In re Hines*, 35 Agric. Dec. 113, 123-24 (1976); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 161-76 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision); and *see Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961); *Hyatt v. United States*, 276 F.2d 308, 312 (10th Cir. 1960); *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *cf. FTC v. Texaco, Inc.*, 393 U.S. 223, 225-26 (1968); *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-95 (1953); and *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726, 738 (1945) (the last three cases involve incipiency doctrine under FTC Act).

By a parity of reasoning, the Department must reject a tariff that is unjust, unreasonable or discriminatory, irrespective of proof of actual injury.

Respondent's argument (10), based upon New York State law, is without merit, and is rejected, because the law of New York State is not controlling in our interpretation of a federal law designed to control interstate transactions. To be sure, the law of agency anticipates that, by agreement, the relationships between agent and fiduciary may be changed (see § I, *Agency 2d*, § § 39, 61, 424). However, here the overriding interest under the Act is the protection of farmers and ranchers, that they not receive less than the true value of their livestock (see § IV(B)(6) and § V(B)(5), *supra*). Moreover, the primary purpose of the Act is to assure fair competition and fair trade practices in livestock marketing (see § II, *supra, Spencer*, No. 87-7189, slip op. at 2849). And, even if the consignors agreed to a scheme whereby the auctioneer was to be paid part of his fee by the buyers, sellers, under the Act, would not be allowed to make such a bargain, regardless of whether they were satisfied with what they got (see § V(B)(3), *supra*).

Respondent's final argument (11) is without merit. While it is certainly "entirely permissible" (as respondent argues) for respondent to institute a tariff similar to one "already approved" by the P&SA, respondent's real argument is that respondent can institute Tariff No. 2 *under color of law*. It cannot, and the Department is otherwise free to reject it, for the reasons below. Respondent's final argument reads in full as follows (RAP at 8-9):

IV.

A DECISION HAS PREVIOUSLY BEEN RENDERED WITH REGARD TO A SIMILAR TARIFF, AND SUCH DECISION IS AVAILABLE TO ALL AUCTION MARKETS AND SHOULD BE HELD CONCLUSIVE IN THIS ACTION.

A decision of the Interstate Commerce Commission on the reasonableness of a rate was made available to all shippers and such decision has been held conclusive in a judicial proceeding involving the same issue with shippers who were not before the Commission in the original proceeding. *Aron v. Pennsylvania R. Co.*, 80 F.2d 100 (CA2 NY 1935), 103 ALR 1367, *cert. den.*, 298 US 658 (1935). Presently there is a tariff which has already been approved by the USDA, similar to Kent's tariff which works to shift a share of the burden of paying a fee from the sellers to the buyers. (RX 1). Since a similar tariff has previously been approved, Kent is able to avail himself to this decision which granted approval to a tariff similar to his. Case law cited above indicates that this is entirely permissible. Also, this tariff has caused no problem, and has had no detrimental effect on the market. In fact, the P&SA did not know of the existence of this tariff until the present cause of action was commenced. This case law should be strongly considered in the deliberation of this issue.

When the 1978 Amendment to the Act basically took the Department out of the ratemaking business, competition was installed to determine rate levels. Congress left intact, however, the Secretary's authority to determine just, reasonable and nondiscriminatory rates (see § III, *supra*).

The testimony herein reveals that there has been in existence since at least 1964,[11] a tariff similar to respondent's Tariff No. 2 (Tr. 57). However, the Matthes Farm Tariff No. 6 not only has not been the subject of a USDA rate proceeding, it apparently has existed for almost 25 years without the P&SA even being aware of it (Tr. 58). The Matthes Farm Tariff No. 6 shifts a small portion of the seller's fee to the buyer (Tr. 57). It is the Matthes Farm tariff which respondent argues should be conclusively available to all auction markets. Respondent invites strong consideration of the *Aron* decision (*Aron v. Pennsylvania R.R.*, 80 F.2d 100 (2d Cir. 1935), 103 A.L.R. 1367, *cert. denied*, 298 U.S. 658 (1935)), which had to do with livestock services required of railroads under the Twenty-Eight Hour Law (34 Stat. 607, 608, 45 U.S.C.A. § § 71, 72).

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[11]Respondent's exhibit (RX 1), a copy of the Matthes Farm Tariff No. 6, reads at the bottom of page 2, "Posted: December 1, 1983 Effective: January 1, 1984." The testimony (Tr. 57-61) regarding the effective date is conflicting. Since it does not really affect the outcome herein, respondent's counsel's statement that it is 1964 (Tr. 61; and see Tr. 58) will be used. The 1984 date would be more advantageous to the complainant, as P&SA has admitted that tariffs since the 1978 Amendment are not closely examined by P&SA, as a rule.

Although superficially somewhat persuasive, respondent's *Aron* argument does not withstand scrutiny. In fact, it actually does more to help complainant, when properly applied herein. However, to show this, some explication of *Aron* is necessary.

Respondent's argument closely paraphrases a dictum appearing at the very end of *Aron*, which does indicate, with authorities cited, that all shippers have available to them an agency decision on the reasonableness of a rate *in a proceeding* involving the same issues, even though the shippers were not before the agency *in the proceeding*. As the court states in *Aron* (80 F.2d at 103) (emphasis added):

> Moreover, the Interstate Commerce Commission in a hearing on the Strauss & Adler claim, referred to above, determined that a charge of $1 for single and $2 for double deck cars was not unreasonable. Strauss & Adler v. New York Cent. R. Co., 188 I.C.C. 487. It is true that these appellants were not before the commission in that proceeding, but since a decision of the commission on the reasonableness of a rate is available to all shippers, when the determination is against the railroad, there is no reason for not accepting the decision in favor of the railroad with the same effect. A. J. Phillips Co. v. Grand Trunk Western R. Co. [236 U.S. 662 (1915)], supra, National Pole Co. v. Chicago & N.W. R. Co. [211 F. 65 (1914)], supra, and Corray v. Baltimore & O. R. Co. (D.C.E.D. Ill.) 2 F. Supp. 829, sufficiently established the effect of a determination between a railroad and one shipper in a case involving the same issues with a different shipper.

The cases cited in support above, *Phillips, National Pole*, and *Corray*, are examined, *infra*, but, first, the actual holding in *Aron* is quite different than respondent would have one to believe from the above dictum. *Aron* decides, *inter alia*, that the reasonableness of a rate involving the nature of livestock-handling services is usually dependent on *findings* of both law and fact by *the agency, and that the agency must make a determination of pertinent facts* before the nonparty shippers can claim the collateral effect emanating from the proceeding. As stated in *Aron* (80 F.2d at 101-03) (emphasis added):

> The court below said that it was a charge for transportation and that the appellants could recover the excess over a reasonable amount as damages, but since this involved a determination of a reasonable charge, the action could not be maintained in the absence of a finding by the Interstate Commerce Commission that the charges made were unreasonable and the complaint was dismissed.
>
> Two questions are presented: (1) Whether the service charge was for transportation within the definition of section 1(3) of the Interstate Commerce Act (49 U.S.C.A. § 1(3)), and if so, are the appellants entitled to recover; and (2) if the appellees are so liable, must the damages be first determined by the Interstate Commerce Commission?

The act, section 1(3), provides: "The term 'transportation' * * * shall include * * * all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." The Commerce Commission in a case involving other shippers, ruled that service charges, identical with those here in suit, were for services within thisdefinition of "transportation." Strauss & Adler v. New York Central R. Co. (1929) 153 I.C.C. 609. The question of whether or not certain services are within the definition of transportation is not purely a question of law, but it involves the determination of a fact. Atchison, Topeka & Santa Fe R. Co. v. United States, 295 U.S. 193, 55 S. Ct. 748, 752, 79 L.Ed. 1382; Adams v. Mills, 286 U.S. 397, 52 S. Ct. 589, 76 L.Ed. 1184. In the Atchison Case, the court reversed a dismissal of a suit to enjoin an order of the commission on the ground that the orders were invalid for lack of a prior finding of fact by the commission. Similarly, we think the question in this case is not solely one of law but of fact. The determination of a pertinent fact by the commission may be given collateral effect. See A.J. Phillips Co. v. Grand Trunk Western R. Co., 236 U.S. 662, 665, 35 S. Ct. 444, 59 L.Ed. 774; Keogh v. Chicago & N.W. R. Co., 271 F. 444 (C.C.A. 7); National Pole Co. v. Chicago & N.W. R. Co., 211 F. 65 (C.C.A. 7).

. . . .

The Hepburn Act of June 29, 1906 (34 Stat. 584, c. 3591), amending the Interstate Commerce Act, broadened the definition of "transportation" to give the commission jurisdiction over services necessarily incidental to shipment. These incidentals had been the sources by means of which abuses of overcharges and discrimination had been practiced and Congress brought the entire body of such services within the term "transportation."

. . . .

The determination of damages in the instant case involves a finding of a reasonable rate, and the court will not determine that question without a prior finding by the commission. Although section 9 (49 U.S.C.A. § 9) gives an apparently clear right to sue, the courts in the interest of uniformity have declined to accept the decision of questions involving functions essentially belonging to the commission. Great Northern R. Co. v. Merchants' Elevator Co., 259 U.S. 285, 42 S. Ct. 477, 66 L.Ed. 943; Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350, 51 L.Ed. 553, 9 Ann. Cas. 1075; Robinson v. Baltimore & O. R. Co., 222 U.S. 506, 32 S. Ct. 114, 56 L.Ed. 288; Norge Corporation v. Long Island R. Co. (C.C.A. 2) 77 F.(2d) 312. The court below correctly declined to entertain this suit, since there

had been no prior finding by the Interstate Commerce Commission as to these appellants' damages.

Thus, *Aron* holds that the shippers who would take advantage of a rat decision "by right" must have a proceeding to point to in which similar issue and similar facts were determined and found, respectively, *by the agency* Merely having a rate on file at the agency would *permit* the institution of similar tariff, but would not give color of law to a filed tariff on facts not ye adjudicated by the agency.

The *Phillips, National Pole*, and *Corray* cases, *supra*, make this same point In *Phillips*, the Supreme Court determined that when the ICC *had examined* the reasonableness of railroad lumber rates, "[t]he *finding* thereon was genera in its operation and inured to the benefit of every person that had bee obliged to pay the unjust rate" (*Phillips, supra*, 236 U.S. at 665) (emphasi added). Likewise, the Seventh Circuit in *National Pole* cited several Suprem Court cases on this same issue, stating that "[t]hese decisions end the claim o shippers that they should recover judgments for excessive exactions i published tariffs *while those tariffs stand uncondemned* by the commission (211 F. at 70) (emphasis added).

In *Corray*, the court approvingly cites the *Phillips* decision, and also make the point that, until the agency makes a finding of reasonableness, a filed an published tariff is not available by right to others similarly situated, and th Commission is not estopped from acting against those shippers. The cour stated (2 F. Supp. at 831) (emphasis added):

> [R]ates fixed by the carriers under the power granted to them by Congress become legal rates upon the filing and publishing of the same with the Commission, and deviation from such published rates was declared a criminal offense and a civil wrong. However, such rates are not the result of legislative act by the Commission. They are the legal act of the carrier, and, in the absence of a specific finding by the Commission of reasonableness in pursuance of its legislative capacity, there is no estoppel against the Commission thereafter granting relief against the same. The reason for estoppel being in the fact that no legislative act may be retroactive to the detriment of citizens, in the absence of any legislation there is nothing that can be urged as retroactive.

This language is illustrative of the fact that respondent's argument (11) not only does not help respondent, it does more to help complainant, specifically, with the existence of the Matthes Farm Tariff No. 6.

As shown by *Aron* and the other cases analyzed above, the respondent does not have color of right to institute a tariff merely because there exists a similar tariff on file at the agency. The agency must have made a finding as to the reasonableness of that filed tariff. As pointed out in *Corray*, agencies have had delegated to them by Congress both quasi-legislative and quasi-judicial functions. Here the Matthes Tariff No. 6 has not had a finding of reasonableness. Thus, it is vulnerable to a finding of unreasonableness by P&SA on a similar tariff, during the exercise of the agency's tariff-review function. Such a finding of unreasonableness by P&SA regarding respondent's

Tariff No. 2 would, in turn, form the basis for the examination of the Matthes Farm Tariff No. 6. And, as pointed out in *Corray*, this would not be impermissibly retroactive because there has never been a finding of reasonableness on the Matthes Tariff or any similar tariff. Since I find that respondent's Tariff No. 2 is unreasonable, the very similar Matthes Farm Tariff No. 6 could also be found unreasonable, in the absence of some sort of special services provided buyer (not incidental to sale), alluded to by complainant (see, Complainant's Proposed Findings of Fact, Conclusions, and Order and Brief in Support Thereof (Dec. 16, 1986)).

For the foregoing reasons, the following order should be issued.[12]

Order

Tariff No. 2 of respondent Victor L. Kent & Sons, Inc., is rejected, and respondent's Tariff No. 1 shall remain in effect until such time as respondent files a new tariff that is not unjust, unreasonable or discriminatory.

This order shall become effective on the 30th day after service thereof upon the respondent.

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[12]This is one of a group of cases that has been unreasonably delayed in the Office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Because of budgetary constraints, an assistant was not obtained until November 2, 1986.

In re: WINCHESTER FOODS, INC., and LEE R. COX.
P&S Docket No. 6799.
Decision and order filed March 15, 1988.

Misrepresentation of variety of meat sold - Inaccurate marking of containers.

Allan R. Kahan, for Complainant.
Respondent, pro se.
Decision issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under Title II of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter referred to as the Act, instituted by complaint and Notice of Hearing filed December 4, 1986, by the Administrator, Packers and Stockyards Administration (P&S), United States Department of Agriculture (USDA).

Specifically, it is alleged that respondent Winchester Foods, Incorporated (Winchester), under the management, direction and control of respondent Lee Cox, in connection with the operations of Winchester as a packer subject to the Act, from the period November 4, 1984 through March 23, 1985,[1] in more than five hundred (500) transactions during that period engaged in unfair and deceptive trade practices by fraudulently selling and delivering both fresh and frozen meat which was purported and represented to be boneless bull meat when, in fact, such meat was not boneless bull meat but rather was a combination of boneless bull and cow meat. Such practice was alleged to be a willful violation of section 202(a) of the Act (7 U.S.C. § 191(a)).

Reply was filed February 24, 1987, by respondent Cox in which he admitted the jurisdictional allegations with respect to the corporation; generally admitted the jurisdictional allegations with respect to himself and, specifically, that he was partially responsible for the management, direction, and control of the operations of Winchester; denied he was a packer subject to the provisions of the Act; and generally admitted that the product designated - bull meat - was shipped to stores and customers set forth in the complaint. As affirmative defenses, respondent Cox stated that the meat sold by respondent Winchester was labelled in conformance with 9 C.F.R. § 317.4(e) and had been approved by a federal meat inspector.

Prior to oral hearing, July 17, 1987, counsel for respondents, during a telephone conference participated in by all parties, requested a continuance of the oral hearing. The basis of the request was that respondents Winchester and Cox had filed under Chapter 11 of the Bankruptcy Act and that sections 316a and 362b(4) (11 U.S.C. § § 316a, 362b(4)) of the Bankruptcy Act stayed any proceeding filed by the United States Department of Agriculture. On the

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[1] The complaint was amended at the oral hearing, to extend the period to June 25, 1984 through March 23, 1985. (Tr. 193-195)

References to exhibits are designated "CX" and "RX" to indicate those submitted by complainant and respondents, respectively. References to the hearing transcript are designated "Tr.".

basis that neither section 316 nor 362b(4) confer authority to stay this administrative proceeding before the United States Department of Agriculture, the motion was denied.

Oral hearing was held before the undersigned July 21-24, 1987, in Wichita, Kansas. Respondent Cox was represented by Christine M. Tamburini, Esq., Focht, Hughey, Hurd and Calvert, Wichita, Kansas. Complainant was represented by Allan R. Kahan, Esq., Office of the General Counsel, United States Department of Agriculture.

The record remained open until such time as financial data requested by complaint counsel was obtained from respondent Cox. A joint stipulation setting forth agreed-to financial data pertaining to respondent Cox was filed on December 1, 1987. By Order of December 17, 1987, the parties were advised that simultaneous findings/briefs would be submitted by February 1, 1988. This time was extended to February 5, 1988, upon request of complaint counsel and without objection by respondents' counsel.

On February 2, 1988, respondents' counsel telephoned the undersigned to advise that she was having some problems dealing with her client and that she had mailed a Motion to Withdraw on January 28, 1988. Further, a 30 day extension was requested to afford respondent Cox to retain the services of other counsel for the purpose of filing findings/brief. Respondents' counsel was orally advised that 6 months had elapsed between the time of oral hearing and the date set for filing findings/briefs. With no assurances that such would be filed within a 30 day extended period, respondents' counsel was advised that such request would be denied and filing of findings/brief were to be made by February 5, 1988. (Summary of Telephone Conference issued February 3, 1988) Since the undersigned has no control over the attorney-client relationship, the Motion to Withdraw, filed at the eleventh hour, was reluctantly granted. (Order issued February 23, 1988)

Complaint counsel filed findings/brief on February 5, 1988. Findings/brief have not been filed on behalf of respondent Cox. The Order and Decision issued here has taken into consideration all of the evidence of record received at the oral hearing.

Findings of Fact

1. Winchester Foods, Inc., hereinafter referred to as the corporate respondent, was a corporation organized and operating in the State of Kansas. Its business mailing address was 521 S. Main Street, Hutchinson, Kansas 67504. (Respondent's Answer)

2. The corporate respondent was, at all times material herein:

(a) Engaged in the business of buying livestock in commerce for slaughter purposes only; and

(b) A packer within the meaning of the Act and subject to the provisions of the Act. (Respondent's Answer; CX 1-2)

3. Lee R. Cox, hereinafter referred to as the individual respondent, is an individual whose mailing address is 6103 Tobacco Road, Hutchinson, Kansas 67502. (Respondent's Answer)

4. The individual respondent is, and at all times material herein was:

(a) Secretary-Treasurer of, a member of the Board of Directors of, and owner of 95% of the stock of the corporate respondent; (Respondent's Answer)

(b) Responsible for the management, direction and control of the practices and activities of the corporate respondent. (Respondent's Answer; CX 1-4; Tr. 21-29)

(c) The individual respondent is, and at all times material herein was, a packer within the meaning of the Act and subject to the provisions of the Act.

5. "Bull Meat" is preferred by customers not only for the lean content of the meat, but also for its color, the quality of its muscle texture, better flavor, and better keeping quality. It is a coarser meat which when mixed with scraps of beef fat from other cuts of meat produces a more attractive ground beef product than cow meat. Because of these characteristics, it is sold at a higher price than cow meat. (CX 34-38; Tr. 152-53, 271, 282-84, 288, 303, 310, 315, 325)

6. To be authorized to use the written term "Bull Meat" on a shipping carton, it would have to be approved as a true label, placed under a quality control procedure, and controlled by a USDA inspector to assure that bull meat was placed in the shipping carton. USDA is responsible for approving labels. (Tr. 238-39, 392-94, 424)

7. The use of the initials "B.M." on a shipping carton may be acceptable as an in-house code for the packer to identify a product, but it could not be used to designate "Bull Meat" since it did not go through the USDA process of obtaining an approved label. A packer could use any symbol he wished as an in-house code. The use of the initials "B.M." was acceptable as an in-house code provided the customer understood what product was being shipped in boxes containing "B.M." markings, and that the words "Boneless Beef" would also be used in conjunction with it so as not to be misleading. A stamp "Boneless Beef 90CL" is understood to mean boneless beef 90 percent lean. This only refers to the lean content of the meat in the carton. (Tr. 129, 269, 292, 397-99, 400-01, 411-12, 416, 429-30)

8. Investigators from the Packers and Stockyards Administration, USDA, obtained all records of respondent Winchester relating to its operations including purchase invoices, invoices to customers, check vouchers, grade and weight accountings, daily kill records and production records. For the period June 25, 1984 to March 21, 1985, a tabulation was made of bull carcasses boned, and the estimated cow carcasses added to the bull meat. (CX 5, 6; Tr. 17, 32)

9. For the representative dates, November 1-8, 1984, daily kill records of respondent Winchester individually identified the livestock, i.e., bull, cow, slaughtered on a particular date, together with the hot and cold weights of the particular animal. For November 8, 1984, the boning room production is also shown. Calculating the highest estimated bull meat yield possible from a boned bull carcass, 76.98%, 3,978 pounds of boneless bull meat could have been produced on that date from 7 bull carcasses. For this same date, and calculating the highest cow meat yield possible from a boned cow carcass, 76.16% (Winchester's actual yield was 68.62%), 103 cow carcasses yielded 37,555 pounds of boneless cow meat. For this date, November 8, 1984,

respondent Winchester's records listed a production of 8,280 pounds of boneless bull meat. The difference between actual bull meat produced (3,978 lbs.) and the listed production of boneless bull meat (8,280 lbs.) resulted in the use of 4,302 pounds of boneless cow meat mixed with boneless bull meat to produce the listed 8,280 pounds of boneless bull meat. This mixture was shipped to customers as 100% bull meat. (CX 5, 14, 14A, 14B; Tr. 34-36, 39-40, 41-49, 56-76)

10. Respondent Winchester's records for the representative date of July 24, 1984, show respondent Winchester produced 2,426 pounds of boneless bull meat from 3 bull carcasses, and 31,881 pounds of boneless cow meat from 92 cow carcasses. Although the highest possible yield, 76.98%, would only produce 1,865 pounds of boneless bull meat from the 3 bull carcasses, respondent Winchester's records list 2,580 pounds of boneless bull meat produced on that date. The difference between the highest yield of boneless bull meat that could be produced from the 3 bull carcasses (1,865 lbs.) and the listed production of boneless bull meat (2,580 lbs.) resulted in 715 pounds of boneless cow meat being mixed with boneless bull meat to produce the 2,580 pounds of boneless bull meat. This mixture was shipped to customers as 100% bull meat. (CX 5, 7, 7A; Tr. 84-88)

11. For other representative dates listed below, respondent Winchester mixed the indicated amounts of boneless cow meat with boneless bull meat to achieve the amounts of boneless bull meat listed in its production records and shipped this mixture to customers as 100% bull meat:

Date	Estimated (76.98%) Boneless Bull Meat Produced (lbs)	Boneless Bull Meat Recorded in Winchester (Records (lbs)	Estimated Boneless Cow Meat Added (lbs)
10/29/84	4,441	7,200	2,759 (CX 5, 8, 8A)
10/30/84	4,522	7,799	3,277 (CX 5, 9, 9A)
11/02/84	11,070	12,672	1,602 (CX 5, 10, 10A)
11/05/84	3,443	5,880	2,437 (CX 5, 11, 11A)
11/06/84	742	1,800	1,058 (CX 5, 12, 12A)
11/07/84	3,854	6,540	2,886 (CX 5, 13, 13A)

The record also shows numerous other dates during the period involved where boneless bull meat was mixed with boneless cow meat to achieve the production of boneless bull meat listed in respondent Winchester's records and shipped to customers as 100% bull meat. (CX 5, 6, 15-33)

12. Commencing on October 23, 1980, the Military Contracting Division, Midwest Commissary Field Office, Fort Sam Houston, Texas, entered into a contract with Winchester Packing Co., the predecessor of respondent Winchester, for the purchase of "Fresh Bull Meat, 90% Lean, Fresh Chilled" to be supplied to the Commissary at the U.S. Army Base, Ft. Riley, Kansas. Respondent Cox acquired Winchester Packing Company in October 1983 and changed the corporate name to Winchester Foods, Incorporated. As of February 15, 1984, respondent Winchester became the sole source of supply

for boneless bull meat to Ft. Riley, Kansas. Effective March 29, 1985, the specifications were changed from "Fresh Bull Meat, 90% Lean, Fresh Chilled," to "Beef, Boneless, Chilled, 90% Lean by Analysis." (CX 1, 2, 52-54; Tr. 185-188, 444, 458)

13. During the period November 1984 through March 1985, the Ft. Riley Army Commissary purchased boneless bull meat from respondent Winchester pursuant to its contract. Bull meat was purchased for use in making ground beef because it is much brighter in color, it is a coarser meat which when ground with beef scraps from other cuts makes a more attractive ground beef product than with cow meat. Boneless bull meat was approximately 5¢ to 7¢ per pound higher than boneless cow meat. (CX 50; Tr. 269-71)

14. Shipments to the Commissary at Ft. Riley during the period November 28, 1984 through March 21, 1985, were delivered in 60 pound cartons stamped "BM 90CL." The Ft. Riley Commissary was the largest purchaser of boneless bull meat from respondent Winchester. Because the contract with respondent Winchester required boneless bull meat, the Commissary Officer at Ft. Riley believed that the "BM 90CL" meant Bull Meat 90% Chemical Lean. At no time was the Commissary Officer informed to the contrary as to the meaning of "BM 90CL." If it was known that the cartons contained product other than the boneless bull meat specified in the contract, the contract would have been terminated. Ledger sheets from the records of respondent Winchester show that cartons stamped "BM 90CL" were delivered to the Ft. Riley Commissary on 38 dates when respondent Winchester's production records showed that boneless cow meat was mixed with boneless bull meat for shipment to customers. (CX 5, 6, 34-37, 49, 50, 57; Tr. 183, 271-72)

15. During the period November 1984 through March 1985, McConnell Air Force Base Commissary, Wichita, Kansas, had a similar contract with respondent Winchester as did the Ft. Riley Commissary. The contract specified 100% bull meat, fresh, 90 percent lean. The Commissary was only authorized to purchase bull meat. Boneless bull meat was sold at a higher price than boneless cow meat. During the period November 1984 through March 1985, the Base Commissary received shipments from respondent Winchester in cartons stamped "BM 90CL." It was understood by the Commissary Officer that since the contract for purchase specified 100% bull meat that the "BM" stood for boneless bull meat. Ledger sheets from the records of respondent Winchester show that cartons stamped "BM 90CL" were delivered to the McConnell Air Force Base Commissary on 11 dates when respondent Winchester mixed boneless cow meat with boneless bull meat for shipment to customers. (CX 5, 6, 34-37, 49, 51, 57; Tr. 279-83, 458)

16. During the period June 1984 through March 1985, Dupree Locker Service, Great Bend, Kansas (Dupree), specifically ordered either fresh or frozen boneless bull meat from respondent Winchester. Boneless bull meat was purchased because it has a better leaning quality and uses more beef fat or beef trim when ground. Weekly orders were placed through a salesman. Shipments were received in cartons stamped "BM 95CL." Dupree automatically assumed that this stamp indicated Bull Meat 90 percent lean. Dupree was never advised otherwise by the Winchester salesman. Dupree ordered boneless bull meat and expected the cartons to contain bull meat. If Dupree believed the cartons did not contain 100 percent bull meat, it would have insisted on knowing what they were getting, as well as obtain an

adjustment in price. During this period Dupree received 60 pound cartons stamped "BM 90CL" on dates when respondent Winchester mixed boneless cow meat with boneless bull meat for shipment to customers. (CX 5, 6, 34-39, 57; Tr. 286-290)

17. During the period June 1984 through March 1985, Risley's IGA, South Hutchinson, Kansas (Risley's) specifically ordered boneless bull meat from respondent Winchester. Weekly orders were placed through a salesman. Shipments were received in cartons stamped "BM 90CL." Risley's, since it ordered boneless bull meat, assumed these cartons contained that which it had ordered - bull meat. On occasions, some of the meat received from respondent Winchester was too fat and peeled knuckles had to be added for leanness. During this period Risley's received cartons stamped "BM 90CL" on dates when respondent Winchester mixed boneless cow meat with boneless bull meat for shipment to customers. (CX 5, 34-38, 44, 57; Tr. 294-98)

18. During the period June 1984 through March 1985, Dutches Jack and Jill, Lyons, Kansas (Dutches) ordered boneless bull meat from respondent Winchester because bull meat makes better ground beef for hamburger, its color is better, and it has better flavor. Orders were placed through a salesman and the meat shipped in cartons stamped "BM 90CL." Boneless bull meat was about .04¢ to .06¢ a pound more than boneless cow meat. During this period approximately 10 cartons of boneless bull meat was ordered per week. Since boneless bull meat was ordered, it was assumed that the carton stamped with "BM 90CL" was boneless bull meat. However, some shipments were sent back as not being boneless bull meat. On other occasions, cow knuckles had to be added by Dutches to make the ground meat leaner. During the dates which Dutches received cartons stamped "BM 90CL", respondent Winchester mixed boneless cow meat with boneless bull meat for shipment to customers. (CX 5, 34-38, 57; Tr. 302-306)

19. During the period June 1984 through March 1985, Victory Locker, Halston, Kansas (Victory) ordered boneless bull meat from respondent Winchester. Boneless bull meat was used to lean up other ground beef. It was specifically ordered for restaurant customers. Weekly orders were placed through a salesman and shipped to Victory in cartons stamped "BM." Since Victory ordered boneless bull meat it assumed that "BM" meant bull meat. The salesman from respondent Winchester never advised to the contrary, or that it was mixed with boneless cow meat. During this period Victory received cartons stamped "BM" on dates when respondent Winchester mixed boneless cow meat with boneless bull meat for shipment to customers. (CX 5, 34-38, 43 pp. 2,7; Tr. 308-11)

20. During the period June 1984 through March 1985, Butcher Block, Inc., Larned, Kansas (Butcher) ordered boneless bull meat from respondent Winchester. Boneless bull meat was required because of its texture and leanness which enables beef fat trim to be mixed with it in producing ground meat. Weekly orders were placed through a salesman and shipped to Butcher in cartons stamped "BM." Victory assumed, since it had ordered boneless bull meat, that the "BM" meant bull meat. Butcher was never advised to the contrary by the salesman from respondent Winchester. On the dates Butcher received shipments from respondent Winchester in cartons stamped "BM",

respondent Winchester mixed boneless cow meat with boneless bull meat for shipment to customers. (CX 5, 34-38, 43 p. 3; Tr. 314-318)

21. During the period June 1984 through March 1985, Sedgwick Packing Company, Sedgwick, Kansas (Sedgwick) ordered boneless bull meat from respondent Winchester. Boneless bull meat was ordered because Sedgwick was able to mix more beef fat with it in producing ground beef. Boneless bull meat was more costly than boneless cow meat. When Sedgwick ordered boneless bull meat from respondent Winchester it expected to receive boneless bull meat from them. However, at times Sedgwick received boneless cow meat instead of boneless bull meat. This was brought to the attention of the salesman and price adjustments were made. On dates Sedgwick received boneless bull meat from respondent Winchester, respondent Winchester mixed boneless cow meat with boneless bull meat for shipment to customers. (CX 5, 34-38, 41; Tr. 322-330)

22. An examination of the records of respondent Winchester on 105 dates was made by investigators to determine whether bull carcasses were boned or "bull meat" was shown as being produced. On only 10 of these dates did respondent Winchester's records show sufficient bull carcasses being boned to produce the amount of boneless bull meat which its records listed. On 95 of these dates respondents added boneless cow meat to boneless bull meat to produce the amount of bull meat shown in its records. (CX 6; Tr. 196-199)

Discussion and Conclusions

Background of Investigation

Experienced investigators of the Packers and Stockyards Administration, USDA, meticulously obtained complete records of respondent Winchester ranging from daily kill and production records to eventual invoices to customers. Analyzing these records, and utilizing the industry accepted highest yield percentage per carcass, the estimated production of bull and cow meat was recorded. This was compared with respondent Winchester's actual production records for each type of bull and cow meat to compile computer generated run-off sheets introduced into the record. The methodology followed in the formulation of these exhibits, as well as explanatory testimony relating to them is totally analytical, cogent, and both reliable and creditable.

The conclusion reached from these exhibits, viewed together with representative records of individual customers on specific dates, is that on numerous dates during the period involved boneless cow meat was mixed with boneless bull meat and shipped by respondent Winchester to customers specifically ordering 100 percent boneless bull meat. It is of no consequence, as respondents argue, that even though the shipments comprised a mixture of boneless bull meat and boneless cow meat, the mixture was a quality meat classified as 90 percent chemical lean. Customers ordered 100 percent boneless bull meat, paid the higher price attendant to the boneless bull meat, but instead received a mixture of boneless bull meat and boneless cow meat.

Use of the Code Stamp "BM"

Respondents did not rebut the evidence showing the mixture of cow and bull meat being delivered to customers. Rather, respondents rely on the

tenuous argument that this mixture was approved in the Spring of 1984 by a USDA plant inspector at the time respondent Winchester was authorized to use the initials "BM" stamped on its shipping cartons. In truth, and in fact, this was not so.

Dr. Daniel Skelton, Veterinary Medical Officer Supervisor, USDA, testified that respondents initially requested authority to stamp "Bull Meat" on their cartons. This was disallowed because it would be a true label which, among other requirements, required an approved quality control program and the presence of a USDA inspector on hand to assure that boneless bull meat was being placed in the cartons. A true label must be approved by the USDA. Respondents did not have such program, nor did they seek to qualify under such a program. Rather, respondent Winchester opted for the use of the initials "BM" as a stamp on its cartons. This was found to be "acceptable", as differentiated from "approved", by USDA personnel. However, respondents were advised at that time that "BM", or for that matter any code it wished, could be used only as an in-house code for its own use to identify its product, but not as an official USDA label. It was a decision of the packer whose responsibility was to advise customers of the intended meaning of "BM". As an in-house code, USDA inspectors are not responsible for inspecting the contents of such cartons. (Tr. 234-41, 448, 454-55) Dr. Michael Gangel, Plant Veterinary Medical Officer, USDA, corroborated Dr. Skelton's testimony. (Tr. 399-401, 411-12, 415-16)

Customer Preference for Bull Meat

Finding No. 5 shows the reasons why customers specifically ordered boneless bull meat, only one of which was lean content. A representative number of individual customers of respondent Winchester, Dupree, Risley's IGA, Victory, Dutches, Butcher Block and Sedgwick, all testified they believed since boneless bull meat, not boneless beef 90 percent chemical lean, was ordered by them that this was the product they received from respondent Winchester. They assumed that the "BM" stamp on respondent Winchester's cartons delivered to them stood for "Bull Meat". Although each of these customers was contacted weekly by respondent Winchester, not one of its salesmen imparted the knowledge to these customers that the stamp "BM" meant other than the "Bull Meat" they ordered. Except for the few instances in which the contents of the "BM" cartons were challenged and adjustments made, all paid respondent Winchester for the higher priced 100 percent boneless bull meat when in fact they were receiving a lower priced product, boneless cow meat mixed with boneless bull meat. Nor did the military escape this deception.

The contract negotiated for the Commissary at Ft. Riley, Kansas, on October 23, 1980, specified "Fresh Bull Meat, 90% Lean, Fresh, Chilled". This contract was in effect until March 29, 1985. In February, 1984, respondent Winchester became the sole supplier of the Ft. Riley Commissary for boneless bull meat. Indeed, the Ft. Riley Commissary was the largest customer of respondent Winchester. On 38 occasions during the period in which this contract was in effect, purported boneless bull meat was shipped to the Ft. Riley Commissary in cartons stamped "BM", when in fact either

insufficient boneless bull meat was produced or no bull meat was produced at all by respondent Winchester. For example, on November 14, 1984, Ft. Riley received 7,200 pounds of "Bull Meat". The four bulls boned on this date which were used to fill this order only weighed 3,059 pounds (76.89% yield). It can only be concluded that 4,141 pounds of boneless cow meat was mixed with the boneless bull meat to achieve the 7,200 pounds delivered to the Ft. Riley Commissary. (CX 18B)

Similarly, on March 5, 1985, tally sheets show no boneless bull meat was produced by respondent Winchester. In fact, production records for this date list 25 boxes of cow meat for Ft. Riley. It is obviously concluded that the 1,500 pounds (60 lbs. x 25 boxes) of meat shipped to the Ft. Riley Commissary was not boneless bull meat as required by the contract then in effect. (CX 30)

In the same vein, production records of respondent Winchester on March 6, 1985, show 1,500 pounds of "BM" (25 boxes x 60 lbs.) was produced for McConnell Air Force Base Commissary. Records show that only one bull was boned on that date with a maximum yield of 928 pounds (76.89%). Thus, in order to provide 1,500 pounds of "BM", 572 pounds of boneless cow meat had to be mixed with the boneless bull meat. This was the Base Commissary whose contract with respondent Winchester precluded it from purchasing any meat other than 100% bull meat. (CX 31)

From the record as a whole, credible evidence clearly shows that respondent Winchester supplied customers with a mixture of boneless bull and cow meat in place of 100 percent boneless bull meat which was specifically ordered.

Direction - Control by Responsible Individual

When it has been shown by substantial evidence that the corporate entity has been misused, or that it would effectuate the statutory policy embodied in the Act when a closely held corporation is found to have been engaged in violations of the Packers and Stockyards Act, the corporate veil should be pierced in order to make the order, including the civil penalty, applicable to the responsible individual of the corporation. *In re Floyd Stanley White*, 47 Agric. Dec. ___, (January 11, 1988) slip op. at 125; *Livestock Marketers, Inc. v. United States*, 557 F.2d 748 (5th Cir. 1977) *cert. denied* 435 U.S. 968 (1978); *In re Jackson Union Stockyards, Inc.*, 37 Agric. Dec. 1533 (1978) *aff'd sub nom.*; *Jackson Union Stockyards v. USDA*, 597 F.2d 770 (5th Cir. 1979); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom., Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983 (9th Cir. 1971)

Respondent Cox was the owner of 95% of the stock of respondent Winchester, was a member of the Board of Directors, and also held the position of Secretary-Treasurer. That he claimed he was only partially responsible for the management, direction and control of respondent Winchester is hardly credible. He was still the owner of 95% of the stock of respondent Winchester, and in him rested the authority to overturn actions and decisions made by others which he believed inadvisable or illegal. Such authority was exercised in overruling other stamps used for cartons (Tr. 453). Here it is concluded that the "responsible individual" is respondent Cox.

Wilful Violations

It is clear from testimony of record that respondent Winchester, from the inception of its use of the initials "BM" on its cartons, practiced a deception upon its customers, i.e., portrayed the contents of the cartons as bull meat when in actuality the contents were a mixture of cow and bull meat. Respondent Winchester's salesmen, as well as respondent Cox and others responsible for production, were aware that the cartons stamped "BM" did not contain 100% bull meat. Salesmen contacted their customers on a weekly basis and the customers continued to specifically order 100% boneless bull meat. Salesmen also had weekly meetings with plant management for the purpose of discussing new products and products already being sold. Yet never over the period involved here, as testimony of representative customers show, did salesmen or plant personnel advise these customers of the true contents of cartons stamped "BM". Rather than inform customers of the true contents of cartons stamped "BM" respondents concealed this fact by carefully selecting cow carcasses for color similar to bull carcasses for mixture with bull meat, or in place of bull meat, to further the deceptive practice.

No mitigating circumstance can be accepted for this deception since it was compounded by charging these customers, as well as many others, for the higher priced boneless bull meat. Considering the period of time over which this deception was carried out it must be concluded that such practice was wilful, flagrant and fraudulent. This practice is a serious violation of the Act since it gave respondent an unfair competitive advantage over competitors.

It is further concluded that the practice engaged in by respondent Winchester, under the management, direction and control of respondent Cox, was unfair and deceptive. As such it violates section 202(a) of the Act (7 U.S.C. § 192(a)).

Sanction

Complainant here seeks a civil penalty of $60,000, as well as an appropriate cease and desist order. The civil penalty is being sought to remove the unjust enrichment respondent Cox realized from the fraudulent and deceptive practice he engaged in, and to act as a deterrent to others in the industry who might consider engaging in such practice.

Severe sanctions for violation of the Department's regulations has been an established policy. This is especially so here where the violation found is serious, has an anti-competitive effect on the industry, and undermines consumer trust in the marketing of meats. *In re Floyd Stanley White*, *supra*; *In re Spencer Livestock, et al.*, 46 Agric. Dec. ___ (1987), slip op. at 230-252.

A comparison of the price for boneless cow meat 90 percent lean and boneless bull meat shows that the latter ranged from 5¢ per pound to as much as 28¢ more per pound. For the period November 5, 1984, through March 30 1985, the average price differential exceeded 8¢ per pound. Computations show that for the period June 25, 1984 through March 21, 1985, respondent conservatively realized a total of approximately $28,621.21 by using cow meat.

As well as the issuance of a cease and desist order from continuing a violation, the Secretary is also authorized to assess a civil penalty of not more than $10,000 for each such violation. In determining the civil penalty to be assessed, the Secretary shall consider the gravity of the offense, the size of the

business involved, and the effect of the penalty on the person's ability to continue in business (7 U.S.C. 193(b)).

Here there is no doubt but that the unfair and deceptive practice perpetrated by respondent is a serious violation of the Act, and indeed is a grave offense.

Although respondent Winchester was not operating at the time of oral hearing and was in bankruptcy, the evidence of record discloses that for 1984 and 1985 it had approximately $32,000,000.00 in sales, and this would constitute a substantial business.

Respondent Cox's income for 1985 did not show sufficient income to pay a $60,000 civil penalty. However, the stipulation entered into between the parties shows that his total income for the Federal tax year 1986 amounted to $168,393.00, an adjusted gross income of $167,399.00, and a taxable income of $122,456.00 for which he paid a total tax of $21,430.00.

Complainant asserts that respondent Cox is able to afford to pay a $60,000 civil penalty and still continue in business as Foley Meat, Inc. The latter is owned by respondent Cox. (Tr. 440) A letter submitted on behalf of respondent Cox was filed subsequent to the date for filing of findings/brief. However, it must be considered here since it provides a summary of respondent Cox's present financial condition. Respondent Winchester having gone through bankruptcy procedure is now being liquidated. Foley Meat, Inc. was closed in November, 1987, and is also being liquidated in bankruptcy in the U.S. District Court of Kansas. Finally, respondent Cox has filed under Chapter 11 of the Bankruptcy Act and may have to amend to a Chapter 7 proceeding.

In viewing the above criteria, the gravity of respondent Cox's unfair and deceptive practice cannot be excused. Therefore, a civil penalty of $60,000 will be assessed. However, due to his present financial condition, $20,000 of the civil penalty will be suspended.

Order

Respondent Lee Cox, his agents and employees, directly or through any corporate or other device, in connection with his business as a packer subject to the Act, shall cease and desist from:

1. Misrepresenting the origin, quality, sex, species or variety of meat sold; and

2. Using initials, symbols or other markings on boxes or packaging materials which does not accurately and fully indicate the contents of the box or package.

Respondent Lee Cox, as an officer of any corporation which is subject to the Act, shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in its operations subject to the Packers and Stockyards Act, including but not limited to accounts of sale showing the true and accurate origin, quality, sex, species or variety of meat sold.

In accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), respondent Lee Cox is assessed a civil penalty in the amount of Sixty Thousand Dollars ($60,000.00), of which Twenty Thousand ($20,000) shall be suspended. The amount of Forty Thousand Dollars ($40,000) shall be payable by certified check or money order made payable to the *Treasurer of the United States*, within thirty (30) days of the effective date of this order.

[This decision and order became final April 25, 1988.-Editor]

In re: APA PACKAGING, INC., and DONALD D. TAYLOR d/b/a APA PACKAGING, INC.
PACA Docket No. 2-7426.
Decision and Order filed February 25, 1989.

Failure to make full payment promptly for produce-default.

Edward Silverstein, for Complainant
Respondent, pro se
Decision issued by Paul N. Kane, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act"), instituted by a complaint filed on February 6, 1987, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

It is alleged in the complaint that, during the period May through October 1985, respondents purchased from 19 sellers, and accepted in interstate and foreign commerce, 234 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $148,993.92, and that they failed to maintain sufficient assets in trust as required by section 5(c) of the Act (7 U.S.C. § 499e(c)). Complainant further alleged that such actions were willful, flagrant and/or repeated violations of section 2 of the Act, and requested that a finding to that effect be made and published.

A copy of the complaint was served upon each of the respondents. Respondent APA Packaging, Inc., has failed to file an answer to the complaint and is considered to be in default. *See* 7 C.F.R. § 1.136. Respondent Donald D. Taylor d/b/a APA Packaging, Inc., has filed an amended answer in which he admitted the allegations of the complaint and consented to the issuance of an order. In his amended answer, respondent Donald D. Taylor waived oral hearing, waived his right of appeal, and waived the provisions of section 10 of the Act as they pertain to 10 days' notice before an order may take effect. As the time for respondent APA Packaging, Inc., to file an answer has run, and as respondent Donald D. Taylor d/b/a APA Packaging, Inc., has admitted all of the material facts involved, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent APA Packaging, Inc., ("APA") is a corporation whose address is 125 East Hillandale Road, Kennett Square, Pennsylvania 19348.

2. Respondent Donald D. Taylor ("Taylor") is an individual doing business as APA Packaging, Inc., whose address is Box 478, Westtown, Pennsylvania 19395.

3. Pursuant to the licensing provisions of the Act, license number 841523 was issued to APA on June 26, 1984. This license was renewed annually but terminated on June 26, 1986, when APA failed to pay the annual license fee.

4. Taylor was never licensed under the PACA. However, Taylor conducted business subject to the PACA as a dealer as that term is defined in section 1(6) of the Act (7 U.S.C. § 499a(6)), during at least the period May through October 1985.

5. During May 1985, Taylor entered into an agreement to purchase all of the stock of APA subject to certain conditions. Subsequently, Taylor failed to meet the purchase terms of the agreement and the corporate stock was never transferred to him. However, Taylor continued to operate through the premises of APA.

6. The Secretary has jurisdiction in this proceeding.

7. As more fully set forth in paragraph 8 of the compliant, during the period May through October 1985, respondents purchased from 19 sellers, and accepted, in interstate and foreign commerce, 234 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of $148,993.92. Subsequently, payments were made to some of the sellers which those sellers have accepted in full settlement of their trust claims under section 5 of the Act (7 U.S.C. 499e). However, such payments do not constitute full and prompt payment as required by the Act.

Conclusions

Respondents failure to make full payment promptly with respect to the 234 transactions set forth in Finding of Fact No. 7, above, constitutes flagrant and repeated violations of section 2 of the Act (7 U.S.C. 499b) for which the following Order is issued.

Order

A finding is made that respondents committed flagrant and repeated violations of section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This Decision and Order shall become final and take effect upon its issuance as to respondent Donald D. Taylor d/b/a APA Packaging, Inc.

This order shall take effect as to respondent APA Packaging, Inc., on the 11th day after this Decision becomes final as to it.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final as to respondent APA Packaging, Inc., without further proceedings 35 days after service hereof unless appealed to the Secretary by complainant or respondent APA Packaging, Inc., within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final April 20, 1988.-Editor]

In re: CHRIS SPIRIDIS, d/b/a EASTERN FARMERS EXCHANGE CO.
PACA Docket No. D-88-501.
Decision and order filed March 15, 1988.

Failure to make full payment promptly - Failure to file answer.

Peter V. Train, for Complainant.
Respondent, pro se.
Decision issued by Edwin S. Bernstein, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C.499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 14, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period May 1986 through July 1986, respondent purchased, received, and accepted, in interstate and foreign commerce, from seven sellers, 18 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $126,299.82.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Chris Spiridis, is an individual doing business as Eastern Farmers Exchange Co., whose address is 361 Acorn Street, Unit 5, Deer Park, New York 11729.

2. Pursuant to the licensing provisions of the Act, license number 840435 was issued to respondent on December 20, 1983. This license was renewed annually, but terminated on December 20, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fees.

3. As more fully set forth in paragraph 5 of the complaint, during the period May 1986 through July 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from seven sellers, 18 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $126,299.82.

Conclusions

Respondent's failure to make full payment promptly with respect to the 18 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final April 29, 1988.-Editor]

In re: FLAMINGO PRODUCE SALES, INC.
PACA Docket No. 2-7662.
Decision and order filed February 10, 1988.

Failure to make full payment promptly - Admission of material allegations.

Eric Paul, for Complainant.
Respondent, pro se.
Decision issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on September 10, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United Stats Department of Agriculture. It is alleged in the complaint that during the period August 1985 through April 1986, respondent purchased, received and accepted in interstate and foreign commerce, from six sellers, 16 lots of tomatoes, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $103,147.07. The complaint further alleged that respondent permitted its PACA license to terminate on February 17, 1987, when respondent failed to pay the required annual renewal fee.

A copy of the complaint was served upon respondent, which filed an answer on October 5, 1987, in which it generally admitted the material allegations of the complaint with respect transactions 2 through 5 (totaling $18,038.76); admitted receiving the tomatoes purchased in transaction 6 through 14 (totalling $58,667.66) but affirmatively disputed, in whole or in part, the terms under which the shipments were accepted; and neither expressly admitted nor denied, and therefore admitted pursuant to section

1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c), the material allegations of complaint with respect to transactions 15 and 16 (totalling $26,440.65). Respondent has not requested a hearing on the facts in its answer or by timely motion as provided in section 1.141(a) of the Rules of Practice (7 C.F.R. § 1.141(a)). Complainant has requested that official notice be taken of six reparation proceedings involving the same 16 transactions in which default orders were issued against respondent, and has filed a motion for issuance of a decision and order based upon respondent's admissions of facts in this proceeding and in the six reparation proceedings.[1] Complainant has challenged the substantive nature of the affirmative defenses respondent has asserted in the light of the failure of respondent to previously assert these defenses when a timely assertion could have prevented an automatic suspension of respondent's license. Based upon respondent's admissions and the precedent which this forum is bound to follow, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139.

Findings of Fact

1. Respondent, Flamingo Produce Sales, Inc., is a Florida corporation, whose address is Post Office Box 11066, Tampa, Florida 33680.

2. Pursuant to the licensing provisions of the Act, license number 820593 was issued to respondent on February 17, 1982. This license was automatically suspended on November 29, 1986, when the first of six default orders awarding reparations against respondent became final, and terminated on February 17, 1987, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a) when respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period May 1985 through March 1986, respondent purchased, received and accepted in interstate and foreign commerce, from six sellers, 16 lots of tomatoes, a perishable agricultural commodity, but failed to make full payment promptly of the agreed purchase price, or balances thereof, in the total amount of $103,147.07.

Conclusions

Respondent's failure to make full payment promptly with respect to the 16 transactions set forth in Finding of Fact 3 above, constitute willful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), for which the order below is issued.

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[1]Official notice is taken of the six reparation proceedings identified in complainant's motion in which reparation awards were issued against respondent.

Order

Respondent has committed repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b).

The facts and circumstances as set forth herein shall be published.

Copies shall be served upon the parties.

This order shall become final and effective without further proceedings 35 days after the date of service, as provided in sections 1.142 and 1.145 of the Rules of Practice(7 C.F.R. § 1.130 *et seq.*).

[This decision and order became final April 22, 1988.-Editor]

In re: HARKNESS-COLGATE-BARTELL, INC., d/b/a UNITED PACKING CO.
PACA Docket No. D-88-503.
Decision and Order filed March 9, 1988.

Failure to make full payment promptly - Failure to file answer.

Edward Silverstein, for Complainant.
Respondent, pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 30, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1985 through January 1986, respondent, acting as a growers agent on behalf of 38 growers, sold 272 lots of fruit, all being perishable agricultural commodities, collected the gross proceeds realized from these sales, but failed to account and make full payment promptly of the net proceeds realized therefrom to these 38 sellers in the total amount of $411,230.99.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Harkness-Colgate-Bartell, Inc., is a corporation d/b/a United Packing Co., whose mailing address is P.O. Box 577, Sanger, California 93657.

2. Pursuant to the licensing provisions of the Act, license number 781301 was issued to respondent on May 19, 1978. This license was renewed annually, but terminated on May 19, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period August 1985 through January 1986, respondent, acting as a growers agent on behalf of 38 growers, sold 272 lots of fruit, all being perishable agricultural commodities, in interstate commerce, collected the gross proceeds realized from these sales, but failed to account and promptly pay the net proceeds from these sales to the growers.

Conclusions

Respondent's failure to account and to make full payment promptly with respect to the 272 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), for which the order below is issued.

Order

A finding is made that respondent has committed wilful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision become final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final April 22, 1988.-Editor]

In re: KANSAS CITY PRODUCE, INC.
PACA Docket No. D-88-505.
Decision and order filed February 22, 1988.

Failure to make full payment promptly - Failure to file answer.

Eric Paul, for Complainant.
Respondent, pro se.
Decision issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on November 4, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service,

United States Department of Agriculture. It is alleged in the complaint that during the period March 1985 through August 1986, respondent purchased, received, and accepted, in interstate and foreign commence, from 25 sellers, 108 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $264,784.14.

A copy of the complaint was served upon respondent which complaint has not been answered. The tine for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Kansas City Produce, Inc., is a corporation, whose address is 6235 Kansas Avenue, Kansas City, Kansas 66111.

2. Pursuant to the licensing provisions of the Act, license number 850183 was issued to respondent on November 6, 1985. This license terminated on November 6, 1986, pursuant to Section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period March 1985 through August 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from 25 sellers, 108 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $264,784.14.

Conclusions

Respondent's failure to make full payment promptly with respect to the 108 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act(7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in section 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final on April 13, 1988.-Editor]

In re: NORTHERN BROKERAGE, INC., a/t/a NORTHERN BROKERAGE CO., INC.
PACA Docket No. D-88-507.
Decision and order filed February 23, 1988.

Failure to make full payment promptly - Failure to file answer.

Sharlene W. Lassiter, for Complainant.
Respondent, pro se.
Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act, instituted by a complaint filed on November 6, 1987, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period August 8, 1986, through November 1, 1986, respondent purchased, received and accepted, in contemplation of movement of the goods in interstate and foreign commerce, from 15 sellers, 36 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $165,044.56. The complaint also alleges that the respondent failed to maintain sufficient assets in trust for unpaid sellers as required by section 5(c) of the Act.

A copy of the complaint was served on the respondent on November 9, 1987. Respondent failed to file an answer within the time allotted. 7 C.F.R. § 1.136. Respondent's failure to file an answer constitutes an admission of the allegations. 7 C.F.R. § 1.136. Consequently, complainant filed a motion for the issuance of a decision. Therefore, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Northern Brokerage, Inc., a/t/a Northern Brokerage Co., Inc., hereinafter referred to as the respondent, is a corporation whose mailing address is 1428 Pacific Street, St. Paul, Minnesota 55106.

2. Pursuant to the licensing provisions of the Act, license number 801703 was issued to respondent on March 17, 1981. The license was renewed annually, but terminated on March 17, 1987, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)), when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the compliant, during the period August 8, 1986, through November 1, 1986, respondent purchased, received and accepted in contemplation of movement of the goods in interstate and foreign commerce, from 15 sellers, 36 lots of fruits and vegetables, all being perishable agricultural commodities, but did not make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $165,044.56.

4. As more fully set forth in paragraph 6 of the complaint, pursuant to section 5(c) of the Act, respondent created a trust with respect to the unpaid transactions set forth in paragraph 5 of the complaint. However, respondent did not maintain sufficient funds in trust as required by section 5(c) of the Act.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set orth in Finding of fact No. 3, and to maintain sufficient funds in trust as required by section 5(c) of the Act, Finding of Fact No. 4 above, constitute willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this decision will become final without further proceedings thirty-five days after service, unless appealed to the Secretary by a party to the proceeding within thirty days service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final April 1, 1988.-Editor]

AJM FARMS, INC. v. AMERICAN FRUIT & PRODUCE CORP.
PACA Docket No. 2-7182.
Order on Reconsideration and Denial of Petition for Reopening filed April 12, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER ON RECONSIDERATION AND DENIAL OF PETITION FOR REOPENING

(Summarized)

On March 4, 1988, respondent filed a petition for reconsideration and reopening. Respondent's request for reopening is denied. See Rules of Practice, Section 47.24(b); 7 C.F.R. § 47.24(b). We have reconsidered the order of February 3, 1988, and find that such order is fully supported by the evidence and the law applicable thereto. Accordingly, the petition is dismissed without serving a copy thereof upon complainant.

The reparation awarded in our order of February 3, 1988, shall be paid within 30 days from the date of this order.

CAL-MEX DISTRIBUTORS, INC. v. TONY KASTNER and SONS PRODUCE CO., INC.
PACA Docket No. 2-7101.
Decision and Order filed April 12, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, for Complainant.
LeRoy W. Gudgeon, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $1,537.22, with interest thereon at the rate of 13 percent per annum from April 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CAROLINA PACKERS v. WEST COAST PRODUCE CO., INC.
PACA Docket No. 2-7173.
Decision and Order filed April 27, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $2,065.92, with interest at the rate of 13 percent per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

CENTRAL FLORIDA PRODUCE, INC. v. WEISS FRUIT MARKET.
PACA Docket No. 2-7299.
Decision and Order filed April 14, 1988.

Dennis Becker, Presiding Officer
Complainant, pro se.
Joseph E. Pegrande, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

FLORIDA TOMATO PACKERS, INC. v. ASSOCIATED GROCERS OF COLORADO, INC.
PACA Docket No. 2-7050.
Decision and Order filed April 13, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Richard L. Thorgren, for Respondent.
Decision and Order, issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

GENERAL POTATO & ONION DISTRIBUTORS, LTD. v. CONSUMERS PRODUCE COMPANY, INC.
PACA Docket No. 2-7156.
Decision and Order filed April 11, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

(Summarized)

As to the remaining issues raised by respondent's petition for reconsideration, we find that all issued were analyzed and considered thoroughly at the time of issuance of the February 17, 1988 order. The order of February 17, 1988, is supported by the evidence and the law applicable.

Therefore, respondent's petition for reconsideration is hereby dismissed, and the order of February 17, 1988, is reinstated.

HOMESTEAD TOMATO PACKING CO., INC. v. PBU ENTERPRISES a/t/a QUALITY DISTRIBUTING OF CALIFORNIA.
PACA Docket No. 2-7233.
Decision and Order filed April 27, 1988.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $1,033.20, with interest thereon at the rate of 13 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

H. SMITH PACKING CORP. v. JAMES P. BOSS, d/b/a BOSS POTATO CO.
PACA Docket No. 2-7086.
Decision and Order filed April 28, 1988.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay complainant, as reparation, $35,357.30, with interest thereon at the rate of percent per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

H. SMITH PACKING CORP., v. JAMES P. BOSS d/b/a BOSS POTATO CO.
PACA Docket No. 2-7096.
Decision and Order filed April 28, 1988.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $68,834.38, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

HUNTS POINT TOMATO CO., INC.
v. MARYLAND FRESH TOMATO CO., INC.
PACA Docket No. 2-6960.
Decision and Order issued April 12, 1988.

Notification of breach--must be timely - Broker's duties--terminates after agreement entered - Timeliness of inspections.

Where a load of tomatoes arrived at destination with possible damage by freezing, respondent attempted to notify complainant through broker. However, broker did not convey information to complainant. It was held that since broker's duties normally end at time agreement is entered, broker had no duty to convey information, as a result of which notification was not

timely. Since inspection was held several days after tomatoes were accepted, it was found not to represent condition of tomatoes on arrival. As a result respondent was found liable for the full purchase price.

George S. Whitten, Presiding Officer.
Alexander J. Pires, Jr., Washington, for Complainant.
Stephen P. McCarson, Silver Spring, Maryland, for Respondent.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $15,840.00 in connection with the shipment in interstate commerce of a truckload of tomatoes.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which fled an answer thereto denying liability to complainant. Respondent's answer included a counterclaim in the amount of $11,081.84 arising out of the same transaction as that covered by the complaint. Complainant filed a reply to the counterclaim, in effect, denying any liability thereunder.

Although the amount claimed in the formal complaint exceeds $15,000, the paries waived oral hearing and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, respondent filed an answering statement, and complainant filed a statement in reply. Both parties filed briefs, and complainant was given the opportunity to file a reply brief.

Findings of Fact

1. Complainant, Hunts Point Tomato Co., Inc., is a corporation whose address is 134A New York City Terminal Market, Bronx, New York. At the time of the transaction involved herein, complainant was licensed under the Act.

2. Respondent, Maryland Fresh Tomato Co., inc., is a corporation whose address is Maryland Wholesale Produce Market, Building B-Unit 5-11, Jessup, Maryland. At the time of the transaction involved herein, respondent was licensed under the Act.

3. On January 22, 1985, complainant sold to respondent, through Frank DeTrani acting as broker, one truckload of Poppas Famous brand tomatoes, approximately 85% U.S. No. 1, in 20 pound cartons, consisting of 528 size 5X5 and 1,232 size 5X6 at $9.00 per carton delivered to respondent's place of business in Jessup, Maryland. The tomatoes were shipped on January 22, 1985, from complainant's place of business in New York and arrived at respondent's place of business in Jessup, Maryland, on January 23, 1985, at

approximately 2:00 p.m. The tomatoes had been shipped to complainant from Florida on January 10, 1985.

4. A 16-day temperature recorder was placed on the truck in Florid was taken from the truck following arrival at respondent's place of bus in Maryland. The tape from the recorder showed temperature approximately 48 to 50 degrees until the 6 1/4 day point on the tape. I the 6 1/4 to 6 1/2 day mark, the temperature fell from 50 to 30 degrees w it continued for approximately six hours and then began to rise to 45 de at the seven day mark and back to 50 degrees shortly thereafter. At this approximately 12 hours is missing due to faulty photocopying of the co the tape submitted in evidence. At approximately the 7 1/2 day mark trace again resumes and varies between approximately 46 and 54 degrees shortly after the eighth day where the tape remains steady at 50 degrees 10 1/4 days. At 10 1/4 days, the trace makes a sharp decline to approxim 32 degrees with a sharp rebound to 45 degrees at 10 1/2 days. From 10 days to the 11th day, the trace climbs gradually to 50 degrees an rem between 50 and 53 degrees until it ends about three hours short of the day mark.

5. On January 24, 1985, respondent informed the broker that the toma had signs of chilling injury. On Monday, January 28, respondent told broker that it intended to ship the tomatoes back to the seller. The bro advised respondent not to do this but again gave no notice to complain Complainant's first notice that respondent was complaining of a breac contract occurred on January 29, 1985, in the form of a mailgram which r in relevant part as follows:

> REFERENCE YOUR LETTERS [LOAD] OF PAPPAS FAMOUS 20 LB VINE RIPE TOMATO RECEIVED BY US JANUARY 24, 1985. RYAN RECORDER INDICATES SEVERAL PERIODS OF EXCESSIVE COLD TEMPERATURES. THIS EXCESSIVE COLD TEMPERATURE IS SHOWING IN CONDITION OF TOMATOES WHICH ARE CAUSING EXCESSIVE DECAY BEFORE FULLY RIPENING. SINCE YOU ADVISED US NOT TO RETURN THEM TO YOU FOR YOUR DISPOSAL WE ARE NOW HANDLING THEM FOR YOUR ACCOUNT. WE ACCEPT NO OTHER RESPONSIBILITY.

6. Respondent shipped 880 boxes of the tomatoes to Starr Produce in Norfolk, Virginia on January 29, 1985. On January 30, 1985, at 7:30 a.m., 880 cartons of Poppas Famous tomatoes were federally inspected at the place of business of Starr Produce for condition only and an Abridged Report of Fresh Fruit and Vegetable Inspection was issued which showed the temperatures of such tomatoes to be 50 to 53 degrees Fahrenheit and the condition to be as follows:

> Average approximately 5% green and breakers, 10% turning and pink, 35% light red and red. Average 1% soft, 36 to 64% average 49% Gray Mold Rot and Stem End Rot in various stages.

The record contains no accounting from Starr Produce in regard to the 880 boxes of tomatoes. However, respondent affirms that such tomatoes "sold for a total of $1,940.00."

7. The 880 boxes of tomatoes retained by respondent were federally inspected on January 30, 1985, at 11:35 a.m. after unloading in respondent's store. The Abridged Report of Fresh Fruit and Vegetable Inspection stated that the temperatures of the tomatoes ranged from 51 to 53 degrees Fahrenheit and further stated in relevant part as follows:

> Tomatoes in cartons printed "Poppa's Famous Tomatoes". Stamped Florida Federal-State Inspected 903 139 H, "Applicant states 880 cartons".
>
> Condition only: Average approximately 5% Green and breakers, 35% turning and pink, 30% light red and red. Decay from 20 to 42% per carton, average 32% Alternaria Rot in various stages. Average 5% damage by sunken discolored areas occurring over shoulders.

On March 11, 1985, in a letter to the Department, respondent stated that 316 boxes of the tomatoes which it retained had been sold for a total of $2,467.00. Respondent gave a breakdown of the prices realized from five different sale lots of the 316 boxes of tomatoes but did not state the date on which such tomatoes were sold.

8. On January 31, 1985, complainant sent respondent a mailgram which stated in relevant part as follows:

> DEAR SIR RECEIVED YOUR TELEGRAM OF JAN 29 1985 IN WHICH YOU STATED YOU HAVE A PROBLEM ON TRAILER #RDSZ540291. WE SOLD YOU 528 5/5 AND 1232 5/6 PAPPAS FAMOUS TOMATOES AT A DELIVERED PRICE OF $9.00 TO YOU ON JAN. 22 1985. WE THEN CONTACTED CMX TRAILER DIVISION OF THE PIGGY BACK SALES OFFICE IN WHICH THEY THEN DELIVERED THE TRAILER TO YOU ON JAN. 23 AT 2 PM. THIS INFORMATION IS VERIFIED BY THE MARKET TOLL PLAZA. I DO NOT FEEL YOU CAN JUSTIFY HOLDING THE TOMATOES AT YOUR PREMISES UNTIL NOTIFYING US BY TELEGRAM FROM JESSUP MARYLAND AT 10:39 AM EST ON TUESDAY JAN. 29 THAT YOU ARE HANDLING THE TOMATOES FOR MY ACCOUNT. OUR SALE TO YOU WAS ACCEPTANCE FINAL.

9. An informal complaint was filed on February 21, 1985, which was within nine months after the cause of action herein accrued.

Conclusions

The parties agree that the tomatoes were accepted by respondent on arrival at Jessup, Maryland. The allegation in the last sentence of the telegram sent by complainant on January 31, and quoted in the findings of fact, to the effect that the tomatoes were sold on an acceptance final basis

was never repeated anywhere in this proceeding by complainant and was probably not meant to be interpreted in the same sense as the terminology "acceptance final" is used in the regulations. See 7 C.F.R. § 46.43(m). At any rate, such terminology is incongruous with a delivered sale and we find that the subject tomato sale was not on an "acceptance final" basis. Since respondent accepted the tomatoes respondent became liable to complainant for the full purchase price thereof less any damages shown to have resulted from any breach of contact proven by respondent. Respondent had two major hurdles to overcome in order to substantiate any defense to the complaint in this case. First of all, respondent must establish that prompt notice of any breach was given to complainant. The Uniform Commercial Code Section 2-607(3) states in relevant part that "where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy..." In the normal produce transaction a broker's authority terminates after negotiation of the purchase and sale agreement (*Fowler Packing Co. v. Associated Grocers Co. of St. Louis*, 36 Agric. Dec. 87 (1977); *Maurice W. Sanders v. Greenberg Fruit Co.*, 32 Agric. Dec. 1856 (1973)) and notice to a broker of rejection or breach is not sufficient to give notice to the other party to such an agreement. See Mutual Vegetable Sales v. Lampros Bros., 37 Agric. Dec. 667 (1978) and *Stonoca Farms Corp. v. Clary*, 33 Agric. Dec. 956 (1974). Respondent alleges that it gave notice to the broker on January 24, 1985, that the tomatoes had signs of chilling. Respondent also states that it complained to the broker on January 25, that the Ryan recorder tape showed the tomatoes to be over 12 days old and that the tomatoes reached 40 degrees on the sixth day. Although respondent alleges that this information was passed on to the seller, complainant consistently affirms that it received no notice until the mailgram on January 29. Respondent did not submit a statement from the broker affirming that the notice of January 24 or 25 was passed along to the seller, not did respondent explain why such a statement from the broker was not submitted. We conclude from all of the evidence of record that complainant did not receive any notice of a breach until January 29, 1985.

Respondent asserts that even if notice of a breach was first given six days following arrival of the tomatoes, such notice should still be held to be timely. Respondent cites *Trautmann Bros. Co. v. Thomas*, 16 Agric. Dec. 919 (1957) where notice of a breach of warranty given in regard to lettuce one week following discovery of the breach was held to be timely. However, an examination of that case reveals that the lettuce was federally inspected on the day of arrival so that definite proof of the breach of contract on such date was available. Respondent also cites *Ely Smity v. Fisher*, 16 Agric. Dec. 1008 (1957) which involved a shipment of watermelons which received a private inspection the day following arrival and a federal inspection on the second day following arrival. Such inspections were found not to show a breach o contract, however, it was stated that notice mailed within a week after arrival was timely. Such notice would presumably have preserved the buyer's rights had breach been found. In both of these cases, where a neutral inspection was made shortly following arrival we are confronted with a situation whic'

bears some resemblance to the sale of hard goods. The inspection preserves definite proof of the condition of the commodity at or near time of arrival. In dealing with hard goods, as opposed to perishables, courts are typically much more lenient than we are disposed to be in determining what is a reasonable period of time within which to give notice of a breach. A case more directly on point than those cited by respondent is *Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc.*, 42 Agric. Dec. 1194 (1985). In that case, a load of tomatoes was sold and shipped on February 26, and arrived on March 1. The buyer did not report trouble in the tomatoes until March 4, and was advised by the seller to secure a federal inspection. A federal inspection was not made until March 9. We stated that the March 4 notice:

> ...coming as it did three days following the unloading of the tomatoes and respondent's discovery of the decayed condition of the tomatoes, must be deemed to be untimely. Tomatoes are a highly perishable commodity, and notice of breach should be given as soon as possible. As we stated in *Spudco, Inc. v. Yick Lung Co., Inc.*, 36 A.D. 715 (1977):
>
> > ...a buyer, in order to claim a breach of warranty by the seller, must notify the seller of the alleged breach within a reasonable time after discovery thereof, or be barred from any remedy. This rule is set forth in Section 2-607(3)(a) of the Uniform Commercial Code (UCC). Its purpose, as stated in a comment to that section, is to prevent commercial bad faith. If the seller is notified of the alleged breach within a reasonable time after the buyer takes possession, it can ascertain for itself the nature and extent of the breach, in accordance with UCC Section 2-515, which gives either party, upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform such functions in order to ascertain facts and preserve evidence.
>
> In that case, involving chipping potatoes which are not as perishable as tomatoes, we found that notice given seven days after arrival was unreasonable, and barred the respondent from any remedy.

We find in this case that the notice given six days following respondent's notation of the alleged chilling injury was untimely.

Respondent attempts to make the present case analogous to the case of *Brown & Hill v. U.S. Fruit Co.*, 20 Agric. Dec. 891 (1961). In the Brown & Hill case, green tomatoes were shipped on September 17, and arrived at destination on September 25. The tomatoes were federally inspected on the day of arrival and found to be 75% mature green and 25% turning with no decay. The buyer placed the tomatoes in its ripening room and on September 30, a second federal inspection showed the tomatoes to be 40% mature green, 20% turning, 20% ripe, with decay ranging from 6 to 50%, average approximately 20%, generally Pleospora Rot, mostly in early, some in advanced stages. Notice of breach was given on September 30, 1959. A third federal inspection on October 2, showed that the decay had doubled since

September 30. The Brown & Hill case presented a very unusual situation in that a federal inspection showed the tomatoes to have been apparently perfect on arrival. Thus, the suitable shipping condition warranty applicable in F.O.B. sales was apparently fully satisfied. However, we found that the peculiar type of decay present in the tomatoes made the tomatoes inherently defective at time of sale. The Brown & Hill case is based upon the case of *Bearden Produce Co. v. Pat's Prod. Co.*, 12 Agric. Dec. 682 (1953), where green tomatoes failed to properly ripen due to late blight rot. As that case makes clear, a breach was found on the basis of the implied warranty of merchantability applicable at shipping point, and a breach of such implied warranty was found due to the fact that tomatoes with the particular type of condition defect were incapable of ripening properly. We have been extremely cautious in applying the line of reasoning which underlies these two decisions due to the fact that practically all condition defects in produce can be attributed to diseases of field origin which are present in the produce when it is shipped, and due to the fact that probably most of the produce shipped in this country has such disease spores present. The significant factor in these two cases is not the field origin of the problem but rather the fact that the particular defect makes it inevitable that the produce will not ripen properly, together with the fact that the defect is undiscoverable until such time as the ripening process begins. In this case, respondent noted the alleged chilling injury in the tomatoes on the day following arrival, and presumably a federal inspection would have disclosed such chilling injury at that time. It is evidence to us that respondent delayed far too long in securing a federal inspection of the subject tomatoes and consequently is unable to establish the condition of the tomatoes at time of arrival. See *Pan-American Fruit Company v. Halem Hazzouri*, 25 Agric. Dec. 681 (1966) and *Peter Condakes Co. v. Michael Bros.*, 19 Agric. Dec. 650 (1960). The statement by respondent's expert witness that the damage in the tomatoes resulted from chilling injury and in particular the expert's statement that in his opinion such a chilling injury would not become apparent until the tomatoes begin to ripen, must be discounted in light of respondent's statement that on January 24 the broker was notified concerning respondent's belief that the tomatoes had been chilled.

Respondent also asserts that a breach was committed in this case by complainant at the outset in that the sale was of 85% U.S. No. 1 tomatoes whereas a federal inspection at shipping point showed the tomatoes to be U.S Combination grade. However, the federal inspection in question states that it applies to 1,760 5X6 tomatoes whereas the tomatoes shipped consisted of both 5X5 and 5X6 tomatoes. Consequently, such inspection must be discounted as covering the tomatoes involved in this proceeding. In addition, 85% U.S. No. 1 and U.S. Combination grade are fairly close in regard to applicable standards, and furthermore, even if we deemed notice in regard to such permanent quality factors to be timely, respondent has made absolutely no showing of damages which could be attributed only to such breach.

We find that respondent has failed to substantiate any defense to complainant's action herein. Respondent is liable to complainant for the full purchase price of the subject tomatoes or $15,840.00. The counterclaim, since

it arose out of the tomato transaction, should be dismissed. Respondent's failure to pay complainant the sum of $15,840.00 is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $15,840.00, with interest thereon at the rate of 13% per annum from February 1, 1985, until paid.

Copies of this order shall be served upon the parties.

J. S. McMANUS PRODUCE CO., INC. v. SPADA DISTRIBUTING CO., INC.
PACA Docket No. 2-7192.
Decision and Order filed April 28, 1988.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Stephen P. McCarron, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $23,570.00, with interest thereon at the rate of 13 percent per annum from June 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

JOHN L. O'DONNELL CO., INC. v. AGRIPAC, INCORPORATED.
PACA Docket No. 2-7356.
Decision and Order filed April 27, 1988.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Donald A. Gallagher, Jr., for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $12,530.51, with interest thereon at the rate of 13 percent per annum from November 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

JEROME GROSSMAN d/b/a JEROME BROKERAGE DIST. CO. v. COAST CITRUS DISTRIBUTORS.
PACA Docket No. 2-7293.
Decision and Order filed April 14, 1988.

Edward M. Silverstein, Presiding Officer.
J. Anthony Sedgewick, for Complainant.
Jules S. Rensen, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $8,721.00 plus interest at the rate of 13% per annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

LESTER DISTRIBUTING COMPANY v. BROWN & LOE, INC.
PACA Docket No. 2-7138.
Decision and Order filed April 11, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order respondent shall pay to complainant $667.70, with interest thereon at the rate of 13 percent per annum from September 1, 1985, until paid.

Copies of this order shall be served upon the parties.

MIGUEL GARCIA RIOS d/b/a M.G. RIOS SALES COMPANY v. C. ALEX ABATTI d/b/a A&M PRODUCE COMPANY.
PACA Docket No. 2-7326.
Decision and Order issued April 27, 1988.

George S. Whitten, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $10,017.50, with interest thereon at the rate of 13% per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

FRANK A. MORELLO v. MELON PRODUCE, INC.
PACA Docket No. 2-7132.
Decision and Order issued April 13, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Phillip A. Grefe, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order respondent shall pay to complainant $2,281.35, with interest thereon from October 1, 1985, until paid.

The counterclaim in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

NEW WEST FRUIT CORPORATION v. SID GOODMAN & CO., INC.
PACA Docket No. 2-7139.
Decision and Order issued April 14, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, for Complainant.
Brian McLaughlin, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $6,615.35, with interest thereon at the rate of 13% per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

NOBLES PACKING COMPANY v. S&S PRODUCE CO., INC.
PACA Docket No. 2-6904.
Order of Dismissal issued April 27, 1988.

Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

A Decision and Order in favor of complainant was issued on February 17, 1988, in the above-captioned matter. On petition by respondent, the Order was stayed on March 18, 1988.

Complainant now advises that the controversy was resolved prior to the issuance of the Decision, and has requested that the case be dismissed. Accordingly, it is ordered that this proceeding be dismissed.

OLIVER P. WOLFE, JR., d/b/a WOLVERINE FRUIT CO. v. C. H. ROBINSON COMPANY.
PACA Docket No. 2-7211.
Decision and Order issued April 14, 1988.

George D. Becker, Presiding Officer.
Boone Shusher, for Complainant.
Owen Gleason, for Respondent.
Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $11,267.75, with interest thereon from April 1, 1986, until paid.

Copies of this order shall be served on the parties.

POST & TABACK, INC. v. TOM PANNO, JR., INC.
PACA Docket No. 2-7288.
Correction filed April 12, 1988.

Correction issued by Donald A. Campbell, Judicial Officer.

CORRECTION

In this reparation proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 *et seq.*), a Decision and Order was issued on March 15, 1988. It has come to our attention that the third sentence of the conclusion has a minor error in it. That sentence should read as follows: "In its unsworn answer, respondent alleges that it has certain grievances with respect to the manner in which the complainant dealt with it, and it also alleges that complainant did not properly

credit it for returned items." The order shall be considered corrected as indicated.

The issuance of this correction does not alter the requirement that respondent pay complainant the reparation ordered in our March 15, 1988, within thirty days thereof.

Copies of this order shall be served on the parties.

R. B. TODD COMPANY, INC. v. COOK'S SUPERMARKET.
PACA Docket No. 2-7135.
Decision and Order issued April 13, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order respondent shall pay to complainant $1,200.00, with interest thereon at the rate of 13% per annum from October 1, 1985, until paid.

Copies of this order shall be served on the parties.

RON ZALEWSKI FARMS, INC. v. COMMODITY MARKETING CORPORATION.
PACA Docket No. 2-7193.
Decision and Order issued April 14, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $1,041.00, with interest thereon at the rate of 13% per annum from June 1, 1985, until paid.

Copies of this order shall be served upon the parties.

S&S FARMS, INC. v. TERRIFIC TOMATO COMPANY.
PACA Docket No. 2-7183.
Decision and Order issued April 11, 1988.

Andrew Y. Stanton, Presiding Officer.
Jerry G. Johnson, for Complainant.
Stephen P. McCarron, for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $31,391.98, with interest thereon at the rate of 13 percent per annum, from November 1, 1985, until paid.

Within 30 days from the date of this order, respondent shall pay complainant, as additional reparation for fees and expenses, $436.05, with interest thereon at the rate of 13 percent per annum, from the date of this order, until paid.

Copies of this order shall be served upon the parties.

SOUZA BROTHERS PACKING CO. v. THE TOMATO HOUSE, INC.
PACA Docket No. 2-7099.
Decision and Order issued April 11, 1988.

Dennis Becker, Presiding Officer.
Thomas R. Oliveri, for Complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint in this proceeding is dismissed.

Copies of this order shall be served upon the parties.

SPADA DISTRIBUTING CO., INC. v. PATELLA & CO., INC.
PACA Docket No. 2-7210.
Decision and Order issued April 11, 1988.

Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days of the date of this order, respondent Patella & Co., Inc., shall pay complainant Spada Distributing Co., Inc., as reparation, $3,252.99, with interest thereon at the rate of 13% per annum from November 1, 1984, until paid.

Copies hereof shall be served upon the parties.

STEVCO, INC. v. JOE PHILLIPS, INC.
PACA Docket No. 2-7121.
Decision and Order issued April 13, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $1,200.00. with interest thereon at the rate of 13% per annum from July 1, 1985, until paid.

Copies of this order shall be served upon the parties.

SUNNYSIDE PACKING COMPANY v. SQUILLANTE & ZIMMERMAN SALES, INC.
PACA Docket No. 2-7300.
Decision and Order issued April 13, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay the complainant $2,295.00, with interest thereon at the rate of 13% per annum from August 1, 1985, until paid.

Copies of this order shall be served on the parties.

VALLEY ONIONS, INC. v. SAM WANG FOOD CORPORATION.
PACA Docket No. 2-7625.
Decision and Order issued April 28, 1988.

Dennis Becker, Presiding Officer.
Complainant, pro se.
Joseph A. Cerroni, Jr., for Respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent shall pay to complainant $7,263.50, with interest thereon at the rate of 13% per annum from March 1, 1987, until paid.

Copies of this order shall be served on the parties.

ZELLWOOD FARMS, INC. v. VICTOR FOODS, INC.
PACA Docket No. R-88-86.
Reparation Order issued April 12, 1988.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $39,300.60, with interest thereon at the rate of 13 percent per annum, from February 1, 1987, until paid.Copies of this order shall be served upon the parties.

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4 STAR TOMATO INC. v. REM BROKERAGE CO., INC.
PACA Docket No. 2-7180.
Decision and order issued April 14, 1988.

Untimely rejection - Risk of loss in f.o.b. transactions.

Where shipment of tomatoes are inspected 3 days prior to shipment, receiver, respondent herein, bears risk of loss in a f.o.b. transaction. Respondent failed to meet its burden of proving that the ant infestation occurred prior to shipment. Furthermore notice of rejection seven days after arrival is not timely and respondent is deemed to have accepted the goods.

Peter V. Train, Presiding Officer.
Complainant, pro se, Ellenton, Florida.
William R. Rapaport, San Mateo, California.
Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. Section 499a *et seq.*), hereinafter referred to as the Act. A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $9,862.50 in connection with the sale of a trucklot of tomatoes in interstate commerce.

A copy of the formal compliant and a copy of the Department's report of investigation were served upon respondent. A copy of the report of investigation was served upon complainant. A default order was issued on February 12, 1986, but respondent filed a motion to reopen which was granted and the default was set aside. Respondent then filed an answer in which it asserted that the tomatoes were infested with ants and thus did not meet the specifications of the contact and were rejected. It also filed a counterclaim for damages.

Since the amount claimed in damages does not exceed $15,000.00, the shortened procedure provided for in section 47.20 of the Rules of Practice (7 C.F.R. 47.20) applies. Pursuant to such procedure, the parties were given an opportunity to submit additional evidence in the form of verified statements. Complainant filed an opening statement and a statement in reply to respondent's answering statement. Both parties filed briefs in support of their positions.

Findings of Fact

1. Complainant 4 Star Tomato, Inc., hereinafter referred to as complainant, is a corporation whose post office address is P. O. Box 470, Ellenton, Florida 33532.

2. Respondent Rem Brokerage Co., Inc., hereinafter referred to as respondent, is a corporation whose post office address is 2095 Jerrold Ave., Room 313, San Francisco, California 94124.

3. Both parties are, and at the time of the transaction here, were licensed to do business under the Act.

4. Pursuant to an oral contact, complainant sold a truckload of tomatoes in interstate commerce to respondent. The f.o.b. invoice price was $9,862.50.

5. The tomatoes were inspected on October 29, 1984 and were shipped from Ellenton, Florida to respondent's place of business in San Francisco in a truck provided for by respondent on November 1, 1964.

6. On November 3, 1984, the tomatoes were rejected at the Arizona border because of ants in the truck and the truck returned to El Paso, Texas where the tomatoes and truck were fumigated. The truck left El Paso on November 5, 1984 and continued on to California.

7. The tomatoes were inspected by a U.S.D.A. inspector on November 14, 1984, who found that the average level of decay was 90 percent.

8. The tomatoes were dumped and respondent has refused to pay for the load.

9. The formal complaint was received on June 28, 1985, which was within 9 months of the time the cause of action accrued herein.

Conclusions

The terms of the contract herein are not in dispute and the parties agree that ants infested the tomatoes. The parties disagree, however, as to who is liable for damages caused by the infestation. Complainant argues that since the tomatoes were inspected prior to shipment, the ants must have infested the tomatoes in transit and asserts that in a f.o.b. transaction such as here the risk of loss in transit is on the buyer, respondent herein. Respondent correctly points out that the tomatoes were not shipped until three days after they were inspected and that the ants could have infested the tomatoes within that period. There is also a question of whether the goods arrived at destination on November 7th or November 14, 1984.

Not surprisingly, neither party can demonstrate how or when the infestation occurred. This case however, can be resolved without conclusively determining this question. As noted above, this was a f.o.b. transaction. Respondent bears the risk of loss occurred after the goods are placed on the truck. Complainant, however, must place tomatoes on the truck that are in suitable shipping condition. Suitable shipping condition is defined in section 46.43(j) of the regulations (7 C.F.R. 46.43(j)) to mean that "the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."

In determining whether the warranty of suitable shipping condition applies, we must look to whether the shipment was handled under normal transportation service and conditions. In this regard the uncertainty as to time of arrival referred to above is critical. Respondent, in its answer, asserts that the load arrived on November 7, 1984, yet cannot explain why an inspection did not take place until November 14, 1984. In its reply brief however, respondent alleges that, although its records indicate a November 7th arrival, its customer, Sunset Produce Co., told it the inspection occurred the same day the goods arrived and that the tomatoes must, therefore, have arrived on November 14, 1984. There is no affidavit or other documentary evidence to support this assertion by Sunset that the goods were inspected the same day they arrived. Furthermore, there is no evidence to establish that the tomatoes did not arrive at respondent's place of business on November 7, 1984, yet not arrive at Sunset until one week later. Significantly, neither party elicited information from the truck driver who would know his time of arrival. The supplemental report of investigation shows that the truck left El Paso, Texas on November 5, 1984 to continue the trip after the load was fumigated. It is, therefore, likely that the shipment arrived on November 7, 1984, as respondent initially stated. As set forth below, however, whether the truck arrived on November 7th or November 14th, the result is the same.

Assuming that the shipment arrived on November 7, 1984, the followin conclusions can be drawn. Respondent states that Sunset Produce rejecte the load at the time of delivery (Ex. 3 to Report of Investigation). There i no dispute that the load did not arrive at Sunset until November 14, 1984.

Therefore, it appears that the rejection was not communicated until November 14, 1984. Rejection 7 days after arrival is clearly ineffective See UCC section 2-602. See also *San Tan Tillage Co. v. Kaps Foods*, 38 Agric. Dec. 867 (1979). If the shipment arrived on the seventh, then respondent failed to timely reject the shipment and is deemed to have accepted the goods. It is, therefore, liable to pay the contract price less any provable damages sustained as a result of any breach of the contract by complainant. *Wolf v. Mendelson-Zeller*, 34 Agric. Dec. 690 (1975). The inspection done seven days after arrival, however, is clearly not evidence of the condition of the tomatoes at the time of arrival. There is nothing in the record to show that if the tomatoes arrived on the seventh, they were properly maintained in the interim. In fact, the temperature controls in the truck were not running at the time of inspection. When they were turned off we do not know. Respondent has therefore produced no evidence to prove a breach of contact or what its damages were. It is therefore liable for the contract price if the shipment arrived on November 7, 1984 as is likely.

Assuming, however, that the goods did not arrive until November 14, 1984, respondent is still liable to pay the contract price. As stated above, the warranty of suitable shipping condition is applicable only if the shipment is handled under normal transportation service and conditions. The truck left El Paso after being fumigated on November 5, 1984. If it did not arrive in California until 9 days later, transportation service and conditions were abnormal. In a f.o.b. transaction, the buyer assumes all risk of damage and delay in transit not caused by the seller. In this case, respondent arranged for the truck; the truck driver was his agent. Clearly, the seller cannot be held accountable for delay between November 5, 1984 and November 14, 1984. The warranty of suitable shipping condition is thus, not applicable. The respondent is responsible for any damage in transit.

Under the facts and circumstances of this case, respondent is liable unless it can prove that the ant infestation occurred prior to shipment. Respondent attempts to meet that burden by stating that the truck company said it always steam cleans its trucks prior to shipment. This unsubstantiated hearsay statement is not sufficient to prove that this truck was steam cleaned prior to this shipment. Additionally, respondent's brief cites a statement purportedly made by a local trucker to the effect that it is highly improbable that the ants were able to enter the truck while the truck was in transit. This is not evidence.

We find based on this record that it is possible that the ants infested the tomatoes once they were placed on the truck. Therefore, we cannot find that the tomatoes became infected prior to that time. Thus, respondent has failed to carry its burden of proof in this regard.

Irrespective of whether the tomatoes arrived on the 7th or the 14th of November, 1984, respondent has the burden of proving that complainant breached the contract i.e. that the ant infestation occurred while the tomatoes were under complainant's control. It has failed to meet this admittedly difficult burden. It is thus liable to pay to complainant the full contract price of $9,862.50. Its failure to pay this amount is a violation of section 2 of the Act for which reparation should be awarded with interest.

Order

Respondent's counterclaim for damages is hereby dismissed.

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $9,862.50, with interest there on at a rate of 13 percent per annum from December 1, 1984, until paid.

Copies of this order shall be served upon the parties.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER
(Summarized)

CAB PRODUCE CO. v. JOHN M. HILLAS d/b/a HILLAS PACKING CO.
PACA Docket No. RD-88-222.
Default Order issued April 21, 1988.

Respondent was ordered to pay complainant, as reparation, $8,921.70, plus 13 percent interest per annum thereon from March 1, 1987, until paid.

CEE-BEE PRODUCE INC. v. U.S. FOOD MARKETING INC.
PACA Docket No. RD-88-209.
Default Order issued April 19, 1988.

Respondent was ordered to pay complainant, as reparation, $5,597.35, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

CENTRAL AMERICAN PRODUCE INC. v. SIX FLAGS PRODUCE INC.
PACA Docket No. RD-88-225.
Default Order issued April 21, 1988.

Respondent was ordered to pay complainant, as reparation, $56,024.50, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

CHARLES BAILOR & EMANUEL BRAUMSTEIN d/b/a POWER PRODUCE CO. v. J. PANDEL & SON, INC.
PACA Docket No. RD-88-205.
Default Order issued April 19, 1988.

Respondent was ordered to pay complainant, as reparation, $8,682.00, plus 13 percent interest per annum thereon from May 1, 1987, until paid.

CHIQUITA BRANDS INC. v. CENTRAL NEW YORK PRODUCE, INC.
PACA Docket No. RD-88-219.
Default Order issued April 25, 1988.

Respondent was ordered to pay complainant, as reparation, $4,469.00, plu 13 percent interest per annum thereon from February 1, 1987, until paid.

CIRCLE PRODUCE & MARKETING CO. v. DAN E. FRIESEN & CO., INC.
PACA Docket No. RD-88-201.
Default Order issued April 19, 1988.

Respondent was ordered to pay complainant, as reparation, $13,831.20, plus 13 percent interest per annum thereon from June 1, 1986, until paid.

DIXIELAND PRODUCE INC. v. ADA B. WILLIAMS and PHILLIP WILLIAMS d/b/a WILLIAMS PRODUCE CO.
PACA Docket No. RD-88-223.
Default Order issued April 21, 1988.

Respondent was ordered to pay complainant, as reparation, $11,167.00, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

ED GIVEN INC. v. J. PANDEL & SON INC.
PACA Docket No. RD-88-226.
Default Order issued April 26, 1988.

Respondent was ordered to pay complainant, as reparation, $8,942.60, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

FLORIDA EUROPEAN EXPORT IMPORT CO. v. WAYCO CORP. a/t/a AMERITEX PRODUCE.
PACA Docket No. RD-88-217.
Default Order issued April 25, 1988.

Respondent was ordered to pay complainant, as reparation, $16,404.18, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

FRUITHILL INC. v. FLATHEAD CHERRY CO.
PACA Docket No. RD-88-196.
Default Order issued April 15, 1988.

Respondent was ordered to pay complainant, as reparation, $26,300.70, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

G.A.C. PRODUCE CO., INC. v. JOE PINTO & SON, INC.
PACA Docket No. RD-88-197.
Default Order issued April 15, 1988.

Respondent was ordered to pay complainant, as reparation, $23,453.65, plus 13 percent interest per annum thereon from February 1, 1986, until paid.

G&H SALES INC. v. McBRAYER POTATO CHIP CO., INC.
PACA Docket No. RD-88-230.
Default Order issued April 26, 1988.

Respondent was ordered to pay complainant, as reparation, $11,675.83, plus 13 percent interest per annum thereon from March 1, 1987, until paid.

HERITAGE PRODUCE SALES INC. v. GREGORY'S JUICEWORKS INC.
PACA Docket No. RD-88-211.
Default Order issued April 20, 1988.

Respondent was ordered to pay complainant, as reparation, $56,313.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

HORWATH AND CO., INC. a/t/a GONZALES PACKING COMPANY v. MID-STATE FOODS INC.
PACA Docket No. RD-88-218.
Default Order issued April 25, 1988.

Respondent was ordered to pay complainant, as reparation, $2,639.50, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

J.R. KELLY CO. v. SUNSPROUTS HYDROPONICS OF MARYLAND INC.
PACA Docket No. RD-88-199.
Default Order issued April 19, 1988.

Respondent was ordered to pay complainant, as reparation, $2,240.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

LO BUE BROS. INC. v. DAN E. FRIESEN & CO., INC.
PACA Docket No. RD-88-202.
Default Order issued April 19, 1988.

Respondent was ordered to pay complainant, as reparation, $5,475.00, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

N.P. DEOUDES INC. v. G&T PRODUCE CO., INC.
PACA Docket No. RD-88-216.
Default Order issued April 25, 1988.

Respondent was ordered to pay complainant, as reparation, $1,453.50, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

PENINSULA VEGETABLE EXCHANGE INC. v. SIX FLAGS PRODUCE INC.
PACA Docket No. RD-88-215.
Default Order issued April 21, 1988.

Respondent was ordered to pay complainant, as reparation, $13,592.10, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

PRODUCE SPECIALISTS of ARIZONA, INC., v. BRAD D. McQUEEN and MARK E. McQUEEN, d/b/a AL McQUEEN & SONS.
PACA Docket No. RD-85-344.
Order of Dismissal, filed April 28, 1988.

Order of Dismissal issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

On March 1, 1988, an Order to Show Cause was issued, suggesting that the respondent partners had been discharged, and the complaint should thus be dismissed. Complainant was given 14 days from its receipt of such order to show cause why there should not be a dismissal, and has failed to respond. Therefore, we conclude that the respondent partners have been discharged and dismissal of the complaint is appropriate.

Accordingly, the complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

PREMIUM FRESH FARMS v. DEMPSEY-SPENCE INC.
PACA Docket No. RD-88-227.
Default Order issued April 26, 1988.

Respondent was ordered to pay complainant, as reparation, $921.50, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

S.M. JONES & CO., INC. v. S.W. FLORIDA SALES INC.
PACA Docket No. RD-88-224.
Default Order issued April 21, 1988.

Respondent was ordered to pay complainant, as reparation, $2,877.50, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

SOUTHLAND FARMS INC. v. HOMER E. EDEN JR. d/b/a EDEN TRUCK FARMS.
PACA Docket No. RD-88-228.
Default Order issued April 26, 1988.

Respondent was ordered to pay complainant, as reparation, $21,646.85, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

TANITA INC. v. U.S. FOOD MARKETING INC.
PACA Docket No. RD-88-220.
Default Order issued April 25, 1988.

Respondent was ordered to pay complainant, as reparation, $545.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

TAYLOR & FULTON INC. v. JOE PINTO & SON INC.
PACA Docket No. RD-88-198.
Default Order issued April 15, 1988.

Respondent was ordered to pay complainant, as reparation, $6,662.50, plus 13 percent interest per annum thereon from June 1, 1986, until paid.

TENNECO WEST INC. v. CHAPMAN PRODUCE CO. INC. FORMERLY: EDWARDS & CHAPMAN PRODUCE CO. INC.
PACA Docket No. RD-88-212.
Default Order issued April 20, 1988.

Respondent was ordered to pay complainant, as reparation, $1,050.17, plus 13 percent interest per annum thereon from March 1, 1987, until paid.

TENNECO WEST INC. v. L.R. MORRIS PRODUCE EXCHANGE INC.
PACA Docket No. RD-88-229.
Default Order issued April 26, 1988.

Respondent was ordered to pay complainant, as reparation, $5,582.00, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

TOM BENGARD RANCH, INC. v. H. HALL & CO., INC.
PACA Docket No. RD-88-214.
Default Order issued April 20, 1988

Respondent was ordered to pay complainant, as reparation, $2,299.50, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

UNITED POTATO CO. INC. v. MARBRO INC.
PACA Docket No. RD-88-213.
Default Order issued April 20, 1988.

Respondent was ordered to pay complainant, as reparation, $5,511.75, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

VALDES FARMS INC. v. JOSE DURAN, d/b/a CHEMICAL IMPORTS/PEOPLES IMPORT & EXPORT CO.
PACA Docket No. RD-88-210.
Default Order issued April 20, 1988.

Respondent was ordered to pay complainant, as reparation, $19,692.10, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

PLANT QUARANTINE ACT

In re: ALLISTER H. LENNOX and EASTERN AIRLINES, INC.
P.Q. Docket No. 321.
Order filed April 6, 1988.

Jaru Ruley, for Complainant.
Respondent, pro se.
Order issued by Victor W. Palmer, Chief Administrative Law Judge.

ORDER OF DISMISSAL

FOR GOOD CAUSE SHOWN, and on the motion of complainant, the complaint against Allister H. Lennox is hereby dismissed.

In re: ANTONIA MARGARITA SOTO.
P.Q. Docket No. 339.
Decision and Order filed February 10, 1988.

Importation of limes - Failure to file answer.

Albert Oakley, for Complainant.
Respondent, pro se.
Decision issued by Paul Kane, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. §§ 151 *et seq.*) and the regulations promulgated thereunder (7 C.F.R. § 319.27 *et seq.*) by a Complaint issued by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture. The Complaint alleged that Respondent violated section 319.27(a) of the regulations (7 C.F.R. § 319.27(a)). A copy of the Complaint and the Rules of Practice governing proceedings under the Act were served by certified mail on Respondent by the Hearing Clerk on July 27, 1987.

Respondent was informed in the Complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the Complaint, and that failure to deny or otherwise respond or plead specifically to any allegation in the Complaint would constitute an admission of such allegation, and further, that failure to file an answer within the prescribed time would constitute an admission of the allegations in the Complaint and a waiver of hearing. Respondent has failed to respond in any manner to allegations in the Complaint and has failed to request an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the Compliant pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the Complaint are adopted and set forth as Findings of Fact:

Findings of Fact

1. Antonia Margarita Soto, herein referred to as Respondent, is an individual whose address is 2802 Springfield, Laredo, Texas 78042.

2. On or about September 21, 1986, the Respondent imported into the United States at Laredo, Texas, from Mexico, approximately two kilograms of limes, a prohibited article, in violation of 7 C.F.R. § 319.27(a).

Conclusions

Respondent has failed to respond in the required manner to the allegations in the Compliant. By reason of the Findings of Fact set forth hereinabove, Respondent has violated the Act and the regulations issued thereunder.

Order

Antonia Margarita Soto is hereby assessed a civil penalty of Seven Hundred Fifty Dollars ($750.00) which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to:

USDA, APHIS Field Servicing Office
Accounting Section, Butler Square West
5th Floor, 100 North Sixth Street
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket Number 339.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of the Decision upon Rspondent, unless Respondent appeals to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final April 26, 1988.-Editor]

In re: GERALD JOHNSON.
P.Q. Docket No. 240.
Decision and order filed January 21, 1988.

Importation of mangoes without permit - Failure to file answer.

Joseph Pembroke, for Complainant.
Respondent, pro se.
Decision issued by Paul Kane, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Act of August 20, 1912, as amended, (7 U.S.C. §§ 151-161a *et seq.* and 167) hereinafter the Act by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent violated sections 154-164 and 167 of the Act (7 U.S.C. §§ 151-164 and 167) and section 319.56-2(e) of the regulations promulgated

thereunder (7 C.F.R. § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding respondent was informed in the complaint and the letter of service that an answer should be filed within (20) twenty days after services of the complaint, and that failure to file an answer would constitute a waiver of hearing, as provided in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

The respondent filed no answer during the twenty-day period allowed. Respondent's failure to file an answer within the time provided constitutes an admission of the allegations in the complaint, under section 1.136(c) of the Rules of Practice (7 C.F.R. 1.136(c)). Respondent's failure to file an answer also constitutes a waiver of hearing under section 1.139 of the Rules of Practice (7 C.F.R. § 1.149). Since respondent is deemed to have admitted the material allegations of fact in the complaint, they are adopted and set forth as Findings of Fact.

Findings of Fact

Gerald Johnson, respondent, is an individual whose address is 1512 Park Place, Brooklyn, New York 11213.

II

On or about September 29, 1985, at Jamaica, New York, respondent imported ten mangoes from St. Kitts, British West Indies, into the United States in violation of 7 C.F.R. § 319.56-2(e), because the fruit was not accompanied by a permit, as required.

Conclusions

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403, within (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final April 6, 1988.-Editor]

In re: GLORIA NEALE.
P.Q. Docket No. 290.
Decision and order filed January 22, 1988.

Importation of yams and mountain apples without permit - Failure to file answer.

Cynthia Koch, for Complainant.
Respondent, pro se.
Decision issued by Paul Kane, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, (Act) (7 U.S.C. § § 151-161a and 167) and regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent had violated the Act and sections 319.56(c) and 319.56-2(e) of the Code of Federal Regulations (7 C.F.R. § § 319.56(c), 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were sent to respondent by certified mail. Neither the complaint, nor the return post-office receipt were sent back to the Department. Thereafter, a letter was sent to the post-office to determine what had happened. In response to the Department's letter, the post-office sent the Department the respondent's new address. Thereafter, on January 10, 1987, the compliant was served upon respondent by certified mail, in conformity with section 1.146(b)(3) of the Rules of Practice (7 C.F.R. § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding respondent was informed in the complaint and the letter of service that respondent had twenty (20) days after receipt of the complaint to file an answer with the Hearing Clerk. Respondent was also informed that failure to file an answer to, or plead specifically to, any allegation in the complaint, would constitute an admission of such allegation. Additionally, respondent was informed that a failure to file an answer within the time allowed thereafter would constitute an admission of the allegations in the complaint and a waiver of hearing. The respondent's answer was eventually filed, but, pursuant to the Administrative Law Judge's order of even date, was withdrawn. Accordingly, under the plain provisions of the Rules of Practice, a default decision should be granted in this case. This Decision and Order, therefore, is issued pursuant to section 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § § 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by the withdrawal of respondent's answer, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Gloria Neale, herein referred to as the respondent, is an individual whose address is 116-03 Nashville Boulevard, Cambria Heights, New York 11411-9998.

2. On or about February 9, 1986, the respondent imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from Jamaica, approximately four yams and approximately three mountain apples in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the yams and mountain apples were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

Conclusions

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent is hereby assessed a civil penalty of seven hundred and fifty dollars ($750.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final April 6, 1988.-Editor]

In re: JOSE EDMUNDO HARO.
P.Q. Docket No. 163.
Decision and Order filed February 3, 1988.

Importation of lemon without permit - Admission of material allegations.

Joseph Pembroke, for Complainant.
Respondent, pro se.
Decision issued by Paul Kane, Administrative Law Judge.

Decision and Order

This proceeding was instituted under the Act of August 20, 1912, as amended, (7 U.S.C. § § 151-164aa *et seq.* and 167) hereinafter the Act, by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that the respondent violated sections 154-164 and 167 of the Act (7 U.S.C. § § 151-164 and 167) and section 319.56-2(e) of the regulations promulgated thereunder (7 C.F.R. § 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served by the Hearing Clerk, by certified mail, upon respondent. In response to the complaint, the respondent filed an answer in which he admitted all the material allegations of fact. Based upon such admission and in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the complainant now files a proposed decision along with a motion for the adoption thereof with the Hearing Clerk.

The respondent was informed that the filing of an answer which admitted all the material allegations contained in the compliant, would constitute a waiver of hearing as provided under section 1.139 of the Rules of Practice. (7 C.F.R. § 1.139). The respondent has filed an answer which admits all the material allegations contained in the complaint.

This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Accordingly, the material facts alleged in the compliant, which are admitted by the respondent in his answer, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Jose Edmundo Haro, herein referred to as the respondent, is an individual whose address is 1620 Rockwood, Calexico, California 92231.

2. On or about April 13, 1985, respondent imported 2 lemons from Mexico into the United States at Calexico, California, in violation of section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)), because the fruit was not accompanied by a permit, as required.

Conclusions

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

The respondent is hereby assessed a civil penalty of two hundred and fifty dollars ($250.00)[1] which shall be payable to the "Treasurer of the United States" by certified check or money order, and which shall be forwarded to USDA, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403, within (30) days from the effective date of this order. This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).
[This decision and order became final April 19, 1988.-Editor]

In re: MICHAEL HAYE.
P.Q. Docket No. 293.
Decision and order filed February 3, 1989.

Importation of mangoes without permit - Failure to file answer.

Cynthia Koch, for Complainant.
Respondent, pro se.
Decision issued by Paul Kane, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended, (Act) (7 U.S.C. §§ 151-164a and 167) and regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that respondent had violated the Act and sections 319.56(c) and 319.56-2(e) of the Code of Federal Regulations (7 C.F.R. §§ 319.56(c), 319.56-2(e)).

Copies of the complaint and the Rules of Practice governing proceedings under the Act were served upon respondent on December 26, 1986, by certified mail in conformity with section 1.147(b)(3) of the Rules of Practice (7 C.F.R. § 1.147(b)(3)).

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the compliant and the letter of service that respondent had twenty (20) days after receipt of the compliant to file an answer with the Hearing Clerk. Respondent was also informed that failure to file an answer to, or plead specifically to, any allegation in the complaint, would constitute an admission of such allegation.

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[1]This civil penalty is in conformance with the guidelines set forth in *In re: Lopez*, 44 A.D. ___ (October 7, 1985).

Additionally, respondent was informed that a failure to file an answer within the time allowed therefor would constitute an admission of the allegations in the complaint and waiver of hearing. More than twenty (20) days have elapsed since respondent was served with the complaint. Respondent has not filed an answer. Accordingly, under the Rules of Practice, a default decision should be granted in this case. This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § § 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as the findings of fact.

Findings of Fact

1. Michael Haye, herein referred to as the respondent, is an individual whose address is 116-35 135th Street, South Ozone Park, Queens, New York 11420.

2. On or about September 17, 1985, the respondent imported into the United States at John F. Kennedy international Airport, Jamaica, New York, from Jamaica, approximately five mangoes in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the mangoes were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

Conclusions

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent is hereby assessed a civil penalty of seven hundred and fifty dollars ($750.00) which shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This decision and order became final April 19, 1988.-Editor]

(Not published here.-Editor)

Animal Quarantine and Related Laws

KING LIVESTOCK COMPANY, HOPPY LOVELL, AND MARK HOLDER. A.Q. Docket No. 311.
Consent Decision as to Hoppy Lovell. April 28, 1988.
Consent Decision as to King Livestock Company. April 28, 1988.

RUSH COUNTY LIVESTOCK SALES, INC., SPEEDWAY TRANSPORTATION, INC. AND JOHN A. STETLER.
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THOMAS, WALTER RAY. A.Q. Docket No. 249. April 26, 1988.

Animal Welfare Act

LOUISIANA STATE UNIVERSITY. AWA Docket No. 354. April 8, 1988.

Horse Protection Act

CAMPBELL, DONALD H. HPA Docket No. 195. April 11, 1988.

Federal Meat Inspection Act

CHRISTIANSEN FARMS MEATS. FMIA Docket No. 88-3. April 8, 1988.

HARRISON BROTHERS. FMIA Docket No. 108. April 6, 1988.

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SAGGUS, DONALD P. P&S Docket No. D-88-14. April 28, 1988.

STOWE, GARY P. P&S Docket No. 6916. April 28, 1988.

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ASSOCIATED FOOD BROKERS, INC., A CORPORATION; ASSOCIATED MEATS, INC., A CORPORATION; BERNIE TOMPKINS, AN INDIVIDUAL; AND CLINT F. BEDSAUL, AN INDIVIDUAL.
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Decision with respect to Swift Independent Packing Company.
April 27, 1988.

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April 22, 1988.

NEW ZEALAND LAMB COMPANY, INC. P&S Docket No. D-88-61.
April 21, 1988.

EGGLESTON, B.L. P&S Docket No. D-88-26. April 06, 1988.

HILL MEAT COMPANY. P&S Docket No. D-88-44. April 11, 1988.

Plant Quarantine Act

ALLISTER H. LENNOX AND EASTERN AIRLINES, INC.
P.Q. Docket No. 321. April 4, 1988.
